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The courts of this country are not in accord upon the question, whether the presence of a stenographer in the grand jury room during the sessions of the jury, vitiates indictments found by that body, though the weight of authority is to the contrary. Some time ago we called attention to the case of State v. Bowman, wherein the Supreme Court of Maine, held that the presence of a stenographer before a grand jury, by express order of the court, while witnesses are being examined, who takes stenographic notes of the testimony, although he retires before the jury commence their deliberations, invalidates an indictment found under such circumstances. 45 Cent. L. J. 383. Shortly afterwards appeared the case of State v. Bates, wherein the Supreme Court of Indiana takes a contrary view. 46 Cent. L. J. 1. The Supreme Court of Vermont very recently passed upon the question and adopted the view of the Indiana court. It appeared in the Vermont case that the State's attorney, with the consent of the court and the grand jury, took his stenographer with him into the grand jury room while they were receiving the testimony on which they found an indictment. The stenographer took down the testimony in short hand, and afterwards transcribed it for the use of the State's attorney. She was not present while the jury were deliberating or voting. It was held that where neither the presence of the stenographer nor her actions had any influence on the jury, and the only contention was that the act of taking the testimony in full might have impressed the jury that an indictment was expected to follow, the irregularities were insufficient to abate the indictment. As before stated, the weight of authority is, that the presence of a stenographer or clerk in the grand jury room does not vitiate its indictments, in the absence of a showing that the substantial rights of a defendant are prejudiced thereby. In very many of the States, especially in such as have Codes, the proceedings by the grand jury, who shall be present, and what the effect shall be upon the indictment if the prescribed proceedings are not complied with, are provided for by statute. The decisions of these States can furnish but little aid in a State where the proceedings have been left to the control of the common law, modified in some respects by statute. In United States district and circuit courts it is generally held that the district attoney may take his stenographer with him before the grand jury, to take down for him the testimony there given. Such stenographer is held to be the assistant of the district attorney, under pay from the United States. United States v. Simmons, 46 Fed. Rep. 65. It is there said: "It is a settled practice for the clerk and assistants of the district attorney to attend the grand jury to assist in investigating the accusations presented before them;" citing a note in Brightley, Dig. p. 209; U. S. v. Kilpatrick, 16 Fed. Rep. 765. Yet the proceedings in the United States courts are controlled to a considerable extent by the common law. U. S. v. Reed, 2 Blatchf. 435.

Other cases bearing directly on this question are Welch v. State, 68 Miss. 341; Com. v. Bradney, 126 Pa. St. 199; Bennett v. State, 62 Ark. 517; State v. Baker, 33 W. Va. 319; State v. Justus, 11 Or. 178, 8 Pac. Rep. 337; State v. McNinh, 12 S. Car. 89; People v. Sellick, 4 N. Y. Cr. Rep. 329; State v. Watson, 34 La. Ann. 669; State v. Kimball, 29 Iowa, 267; Reg. v. Hughes, 47 E. C. L. 518; Com. v. Mead, 12 Gray, 167; Shattuck v. State, 11 Ind. 473; U. S. v. Terry, 39 Fed. Rep. 355; State v. Fertig (Iowa), 67 N. W. Rep. 87; Com. v. Brown, 147 Mass. 585, 18 N. E. Rep. 587; Com. v. Woodward, 157 Mass. 516, 32 N. E. Rep. 939; Com. v. Hayden, 163 Mass. 453, 40 N. E. Rep. 846; State v. Noyes, 87 Wis. 340, 58 N. W. Rep. 386; State v. Davis, 12 R. I. 492, 34 Am. Rep. 704, and note; State v. Hamlin, 47 Conn. 95; Gibbs v. State, 45 N. J. Law, 379. An examination of these decisions will make it clear, so far as observed, that the presence of a stranger in the room with the grand jury, when receiving the testimony of witnesses, with the exception of State v. Bowman, *supra*, is never a cause for abating their indictment unless the respondent avers and shows that he has been prejudiced thereby; and rarely will such presence, when the jury are deliberating or voting, avail, unless the respondent is shown to have been prejudiced thereby in respect to the finding of the indictment.

NOTES OF IMPORTANT DECISIONS.

MASTER AND SERVANT — NEGLIGENCE—DEFECTIVE APPLIANCES.—The question involved in Davis v. Forbes, 51 N. E. Rep. 20, decided by the Supreme Judicial Court of Massachusetts, was of such character as to bring out a vigorous dissent and an exhaustive dissenting opinion from one of the members of the court. The majority of the court held that an employer is not responsible for injuries to an employee resulting from the use of a defective stirrup strap furnished the employee, where the foreman tested it in the presence of the employee, and the employee was satisfied, after the test, that the strap was strong enough, and that when an employee is injured by using a defective stirrup strap, his employer is under no legal obligation to furnish him medical attendance, even where he is liable for the injury. Knowlton, J., dissented.

BANK DEPOSIT—FORGERY.—In Rabb v. Pennsylvania Co., 40 Atl. Rep. 969, decided by the Supreme Court of Pennsylvania, it was held that the mere possession by a bank depositor, without notice to the bank, of a rubber stamp making a *fac simile* of his signature, does not render him liable for loss of money paid out on checks forged therewith. It was decided that a bank depositor was not negligent, as matter of law, in the care of a rubber stamp making a *fac simile* of his signature, with which his office boy, who was not suspected of dishonesty, forged checks, where he placed it in a compartment in a safe, locked the compartment, and put the key thereof in a drawer in the safe, behind some papers, put the key to the drawer in another unlocked drawer, and then locked the safe, and put the key thereof in a box on another safe.

HUSBAND AND WIFE—LIABILITY OF WIFE FOR TORTS OF AGENT—NEGLIGENCE.—The case of Collier v. Sturdy, 47 S. W. Rep. 90, decided by the Supreme Court of Tennessee, involves many interesting questions of the law pertaining to the liability of wife for negligence of her agent. It appeared that the building where an accident occurred through the negligence of a servant in operating an elevator was neither the general nor separate estate of a married woman, but a mere security for the price thereof; the building having been purchased from her, and the note, secured by deed of trust, being made payable to her sole and separate use. It was held that her interest in the property was not such as gave her the power to appoint an agent to manage it, and hence she was not responsible for the negligence; that where one was put in possession of a building, with the consent of a married woman, for the purpose of managing the property for her benefit, but afterwards another was put in possession without her knowledge, and an accident occurred during the latter's possession, through his negligence, the married woman was not in such possession of the property as to make her liable for the negligence; that when the owner of property executed a trust deed thereof to secure a married woman on a note payable to her sole and separate use, he had no authority to appoint for her an agent to manage the property on her behalf. A husband, whose wife had no power to appoint an agent to manage certain property, by reason of having no separate estate therein, was not the owner of the building at the time an accident occurred there through negligence of an employee therein, and had no control thereover. It was held that he was not liable for the negligence. The declaration alleged that a married woman was in possession of a building, and that an accident occurred through the negligence of servants employed by her in operating an elevator therein. It was held that, where the married woman was not liable, no liability could be adjudged against her husband, under the declaration.

CRIMINAL LAW—EMBEZZLEMENT BY AGENT OF CORPORATION—RIGHT TO PART AS COMMISSION.—In Stone v. Commonwealth, 46 S. W. Rep. 721, decided by the Court of Appeals of Kentucky, it was held that one who receives money, a portion of which belongs to himself, as a commission, and which he is entitled to retain as such, is not guilty of embezzlement, though he converts the whole to his own use. The court said: "The appellant was tried and convicted for embezzlement of the funds of the National Life Association of Hartford, Conn., under the following statute: 'If any officer, agent, clerk or servant of any bank or corporation shall embezzle, or fraudulently convert to his own use or to the use of another, bullion, money, bank notes, or any effects or property belonging to such bank or corporation or other corporation or any person, which shall have come to his possession or been placed in his care or under his management as such officer, agent, clerk or servant, he and the person to whose use the same was fraudulently converted, if he assented thereto, shall be confined in the penitentiary not less than one nor more than ten years.' Ky. St. § 1202. On the trial it appeared that appellant was the regular agent at Owensboro for the Fidelity Mutual Insurance Company of Philadelphia; but learning that certain risks might be written in the Hartford company which could not be accepted in his own company, he, in connection with one Gant, who was an agent for the New York Equitable, procured an application for a $10,000 policy from one Thomas Soaper, appellant having first obtained permission and authority to do so from Gathright, the State agent of the Hartford company at Louisville. The application was signed by appellant as solicitor, and Gathright was informed at the time it was forwarded to him that Soaper's note, amounting to $688, would be taken and discounted, and after retention of forty per cent. thereof for appellant and Gant's share, the balance would be sent to Gathright. The application was forwarded to the company by Gathright, and the risk accepted, and the policy issued. Thereupon appellant and Gant discounted the Soaper note, which was payable

to appellant, at one of the banks of the city. Of the proceeds Gant was paid his twenty per cent. Appellant then appears to have bought New York exchange, to the amount of sixty per cent., to be sent to Gathright, who, it seems, was to retain thirty per cent., leaving thirty per cent. for the company. He left the country, however, and the money was never sent.

"It is clear, we think, that appellant was not, within the meaning of the statute, the agent of the Hartford company, having in his possession, care or management money, bonds, notes or effects belonging to that company. The company never had him employed, and heard nothing of him, beyond seeing his name on the application as solicitor. The simple arrangement was that appellant and Gant, as solicitors under special contract with Gathright, were to forward the application of Soaper to Gathright, take the note of the insured, and, as joint owners of the proceeds, discount the paper, and forward the balance to other owners. The rule seems to be will settled that 'in all cases where one receives money, a portion of which belongs to himself as a commission on the whole amount, he is not guilty of embezzlement, though he converts the whole to his own use.' 6 Am. and Eng. Enc. Law, 475, and numerous cases cited. It is different if the whole fund collected belongs to the company, the agent getting his commission in the nature of a rebate out of the sum actually paid over. Clark v. Com. (Ky.), 29 S. W. Rep. 973. We do not think section 633 of the statute, under the head of 'Private Corporations,' and defining and regulating the conduct of insurance companies in this State, and providing that, notwithstanding an application for insurance may provide that the solicitor is agent of the insurer, he is yet the agent of the company, has any sort of application to the statute on embezzlement. Under the state of case presented, the peremptory instructions to find appellant not guilty should have been given."

TAXATION — PATENT RIGHTS — CONSTITUTIONAL LAW.—Code Maryland, art. 81, § 141, requires the State tax commissioner, in fixing the taxable value of shares of stock, to deduct from the aggregate value of all the shares of the corporation the assessed value of the real estate owned by the company, and divide the residuum by the number of shares of stock, and declares the quotient to be the taxable value of each share, and provides that this result shall be valued to the owners of the stock, and the officers of the corporation are made the agents of the State for the collection of the tax. It was held by the Court of Appeals of Maryland, in Crown Cork & Seal Co. v. State, that it is not material that the assets of the corporation include patents, since the tax is not levied on the corporation, but on the owners of the shares of stock; and that Const. U. S. art. 1, § 8, conferring on the federal government the power to promote the progress of science and useful arts by securing for a limited time to inventors the exclusive right to their discoveries, is not violated by a State tax on patent rights. The court said: "The leading question which this appeal presents is whether, in the assessment of the capital stock of the appellant company for purposes of taxation, the appellant is entitled to have the assessment limited to the value of the property other than the patents granted by the United States. There is another question closely interwoven with the main proposition just stated, and will be considered in the course of this opinion, which relates to the constitutionality, both federal and State, of the contention of the appellee. It will not be necessary to burden the report of this case with the various provisions of the Code relating to the taxation of the shares of stock of corporations incorporated under the laws of this State, as they are lengthy, and can be conveniently found by reference to sections 2, 4, 141, and 144 of the Code, contained in article 81. Mr. Chief Justice McSherry speaking for this court in the case of United States Electric Power & Light Co. v. State, 79 Md. 70, 28 Atl. Rep. 768, has forcibly said that: 'The taxable value of shares of capital stock is fixed by the State tax commissioner. He is required by the statutes to deduct from the aggregate value of all the shares of the capital stock of banks and other corporations the assessed value of the real estate owned by the company, and to divide the residuum by the number of shares of the stock, and the quotient is declared to be the taxable value of each share for State purposes of taxation. Upon the valuation thus ascertained the State tax is levied. But the tax is not a tax upon the stock or upon the corporation, but upon the owners of the shares of stock, though the officers of the corporation are made the agents of the State for the collection of the State tax. It is not material what assets or other property make up the value of the shares. Those shares are property, and under existing laws are taxable property. They belong to the stockholders respectively and individually, and when, for the sake of convenience in collecting the tax thereon, the corporation pays the State tax upon these shares into the State treasury, it pays the tax not upon the company's own property, nor for the company, but upon the property of each stockholder and for each stockholder, respectively, by whom the company is entitled to be reimbursed. Hence, when the owner of the shares is taxed on account of his ownership, and the tax is paid for him by the company, the tax is not levied upon or collected from the corporation at all.' This statement of the law, recently announced by this court, gives to the statute a construction so clear and free of doubt that no suggestion of uncertainty can fairly arise as to its meaning and effect. Under sections of the Code just referred to, the taxes in controversy here have been levied and assessed, without regard to the value of the United States patents. The State tax commissioner has, in the proper discharge of his official duty, assessed the value of the shares of stock in the appellant corporation, and has certi-

fied and returned said valuation and assessment to the comptroller of the treasury, who has duly notified the appellant of such valuation and assessment, and upon appeal the comptroller and treasurer have corrected the same, and made their final valuation and assessment, which is final and absolute, unless they shall have committed some error in the discharge of their official duties. It is insisted that they have erroneously valued and assessed the patent rights in question, and this is the chief grievance of the appellant. But why should not the shares of stock in the appellant corporation be valued and assessed, and taxes paid thereon? The number of corporations incorporated under the laws of this State, engaged in business here, employing vast sums of money, and possessed of extensive property rights, is almost unlimited, and yet most of them, in the proper and successful management of their business, have been compelled to purchase and use patent rights, to enable them to compete successfully with other corporations engaged in a similar business. They are without exception compelled to pay taxes on their shares of stock, levied and assessed in like manner with those in controversy here. It is a total misconception of the object sought to be maintained on this appeal to assert that this is an effort to tax patent rights. It is not, however, necessary to the determination of the rights involved in this controversy to decide any such question. It is a proposition about which there is no lingering doubt that patent rights are personal property, and entitled to the same protection as any other property (Cammeyer v. Newton, 94 U. S. 225), and it will remain for future consideration whether a patent right may not of itself be a proper subject of taxation; but that, as just stated, is not a question necessary to be decided on this appeal. It has been elsewhere maintained that a patent right resembles a franchise, in being a privilege which concerns, and is intended to benefit, the public, which depends for existence and preservation upon the authority which confers it. It has also been argued in the hearing of this appeal that a patent contains a bargain made with the government and the patentee, to be judged like other bargains. Conceding both propositions to be correct, how does either tend to affect the questions under consideration here? To say that the shares of stock of a corporation incorporated under the laws of this State cannot be taxed because the corporation enjoys certain franchises, the very use of which enables it to successfully carry on its business, would be to strike down our entire system of taxation relating to corporations. And even if it be true that a patent right exists through the medium of a contract with the federal government, its only effect upon the value of the shares of stock of a corporation, which are unquestionably taxable, is to aid in the development of the business interests of such corporation, and largely multiply the chances of its successful management. So that it is not a question as to how the value of the shares of stock of such corporation have been enhanced, whether by the aid of patent rights, or by the sale of the manufactured product obtained by the use of such patent rights, or by the superior business qualifications of the agents of the corporation, who manage and control its affairs. It matters not how numerous nor how valuable its patent rights might have been at the inception of the appellant's business enterprise; the shares of its stock would now be comparatively valueless had not other agencies, forceful and active, put life and energy into the undertaking. The Supreme Court of Ohio (Jordan v. Overseers of Dayton, 4 Ohio, 310), speaking with respect to the meaning of the patent laws of the Uunited States, and quoted with approval in Patterson v. Kentucky, 97 U. S. 507, says: 'The sole operation of the statute is to enable him to prevent others from using the products of his labors except with his consent.' In the granting of patents the federal government has never sought to do more, and in fact has never exercised greater authority, than extend protection to the privilege, such as that granted by a patent for an invention, against the infringement of those who seek to invade it. A patent right, in its usual signification, means a privilege granted by the government to the first inventor of a new and useful discovery or mode of manufacture that he also shall be entitled, during a limited period, to the exclusive use and benefit thereof. After careful examination, we have failed to discover any satisfactory authority showing that the government has ever yet indicated any intention of limiting the power of the States in dealing with a subject of this kind, although involving patent rights. It is a proposition without support to seek to maintain that patent rights are agencies or instrumentalities of the general government with which the States have no right in any manner to interfere. Patterson v. Kentucky, 97 U. S. 506; Webber v. Virginia, 103 U. S. 344. It is now well settled law, as determined in Telegraph Co. v. Attorney-General, 125 U. S. 551, 552. 8 Sup. Ct. Rep. 965, that 'the agencies of the federal government are only exempted from State legislation so far as that legislation may interfere with or impair their efficiency in performing the functions by which they are designed to serve that government.' In the case of Livingston v. Van Ingen, 9 Johns. 507 (cited and approved in 97 U. S. 508. *supra*), Chancellor Kent said that: 'The national power will be fully satisfied if the property created by patent be, for the given time, enjoyed and used exclusively, so far as under the laws of the several States the propery shall be deemed fit for toleration and use. There is no need of giving this power any broader construction in order to attain the end for which it is granted, which was to reward the beneficent efforts of genius, and to encourage the useful arts.' Mr. Justice Harlan, in referring to the Ohio case and the New York case just quoted from in 97 U. S., *supra*, and pursuing much the

same line of thought, remarks that: 'The right which the patent primarily secures is the exclusive right in the discovery, which is an incorporeal right, or, in the language of Lord Mansfield in Millar v. Taylor, 4 Burrows, 2303, "a property in motion, which has no corporeal tangible substance." The enjoyment of that incorporeal right may be secured and protected by national authority against all hostile State legislation; but the tangible property which comes into existence by the application of the discovery is not beyond the control, as to its use, of State legislation, simply because the inventor acquires a monopoly in the discovery.'

"We have given careful scrutiny to the various authorities to which we have been referred bearing upon the questions raised by this appeal, and have found the propositions contended for both novel and interesting. The result of our investigation is that we have found but two cases directly bearing upon the subject of the taxation of patent rights, as such, which is not the specific question to be determined on this appeal. The case which supports the theory of the exemption of patent rights from taxation is the case of Com. v. Westinghouse Electric & Mfg. Co., 151 Pa. St. 265, 24 Atl. Rep. 1107, 1111. The Supreme Court of Pennsylvania, having filed no opinion, adopted that of the lower court, from which we briefly quote, and which sufficiently marks the distinction between the Pennsylvania case and the one now under consideration. The former case maintains that, 'the tax being upon the capital stock, it is a tax upon the company's property and assets.' This is not the law of Maryland, and such view is not the accepted doctrine held by the United States Supreme Court. Bank of Commerce v. Tennessee, 161 U. S. 146, 16 Sup. Ct. Rep. 460. 'Taxes being made the sole means by which sovereignties can maintain their existence, any claim on the part of any one to be exempt from the full payment of his share of taxes on any portion of his property must on that account be clearly defined, and founded upon plain language. It has been said that a well founded doubt is fatal to the claim. No implication will be indulged in for the purpose of construing the language used as giving the claim for exemption, where such claim is not founded upon the plain and clearly expressed intention of the taxing power.' This court, as hereinbefore referred to, has, through its chief justice, in 79 Md. *supra*, declared that: 'The tax is not a tax upon the stock or upon the corporation, but upon the owners of the shares of stock, though the officers of the corporation are made the agents of the State for the collection of the State tax. It is not material what assets or other property make up the value of the shares. Those shares are property, and under existing laws are taxable property.' We have referred to the one case—that of 151 Pa. St., *supra*, which maintains the non-liability to taxation of patent rights. The case of People *ex rel.* Edison Electric Light Co. v. Campbell, 138 N. Y. 543, 34 N. E. Rep. 370, maintains a doctrine directly contrary to the Pennsylvania case. The New York case was a proceeding by *certiorari* to review the action of the State comptroller in imposing a tax upon the relator, the Edison Electric Light Company, a domestic corporation, under the corporation tax act. The entire capital stock of the relator was originally invested in patent rights. Corporations were formed in New York and other States, to whom the relator granted the right to use these patents, receiving in compensation stock in such corporations. It was decided that as to so much of such stock as was in corporations organized in New York, it was the capital of the relator employed in that State, and as such was a basis of taxation, but that the stock in corporations in other States was capital employed outside the State, and not taxable. It was also claimed in that case that the relator held bonds of foreign corporations, issued to it in payment for patent rights granted, and on this question it was determined that so much of relator's capital as was invested in these bonds was a basis of taxation under the statute. In delivering the opinion of the court, Earl, J., said: 'It is sufficiently accurate for the purpose now in hand to say that the entire capital of the relator was originally invested in patent rights. Corporations were formed in various cities of this State, and to a large extent in cities outside of the State, to use these patents; and to those corporations the relator granted the right to use the patents, and in compensation for such grants it received stock of such corporations, and during the year 1891 it held such stocks and received the dividends declared thereon. As to so much of said stocks as was in corporations organized in this State, it cannot be doubted that its capital was employed in this State. So much of its capital, to-wit, its patents, as was used to purchase such stocks, was employed for that purpose, and was thus used for the business of the relator. The stocks existed within this State, and were kept and held to produce revenue here, and hence in every sense were employed within this State. They took the place, as a portion of the relator's capital, of the patent rights transferred in payment for them. The stocks which the relator took in companies organized outside of this State stood for so much of the relator's capital invested outside of the State. It took a portion of its capital, to wit, a portion of its patent right, and employed it outside the State to purchase those stocks. * * * Those stocks had no *situs* here, and were not taxable here under any system of taxation which ever existed in this State. To make such capital a basis for taxation, it must have been employed within this State. It is said in this record, although not distinctly shown, that the relator also held bonds of foreign corporations, issued to it in payment for patent rights granted. We think that so much of the capital as was invested in such bonds was a basis of taxation here under the act. Those bonds were presumably held at its office

in this State, and such bonds, as well as all choses in action, unless kept, employed, or used outside of the State, have their *situs* at the domicile of the owner. The bonds took the place of the patent rights granted for their purchase. They were kept and held here to earn revenue for the relator, and they were, in a proper sense, employed here for that purpose.' We have thus presented both sides of this controversy, at perhaps greater length than was necessary, but the question is yet *in limine*, and may be regarded as opening a new avenue of judicial investigation. If the comptroller and treasurer have, in reviewing the action of the State tax commissioner, discharged their duty in accordance with the provisions of the Code, under which they were acting,—and we think they have,—their action is final, and from it no appeal will lie."

OBLIGATIONS IMPOSED UPON MUNICIPAL CORPORATIONS WITH RESPECT TO SNOW AND ICE ON SIDEWALKS.

The liability of municipal corporations with respect to sidewalks arises from the obligation imposed upon them to keep such walks in a reasonably safe condition for travel,[1] for, in the absence of negligence or lack of ordinary case in this respect, there is no right or cause of action, and, consequently no violation of duty.[2] Such corporations do not warrant the safety of the streets, their obligations only extending to the use of ordinary care and skill, in view of ordinary emergencies, in maintaining the streets reasonably safe for travel,[3] and proof of ordinary or reasonable care and diligence according to the circumstances will relieve them.[4] The pedestrian, however, must himself use due care in the use of the walks.[5] Such corporations are not required to do what is practically impossible,—to remove snow and ice immediately after it accumulates and forms, but they are liable for defects which could have been remedied.[6] The mere fact that a sidewalk is partly up to grade and partly not up to grade, the two portions being joined by a stoop, is no defect *per se*, neither is the fact that snow has been loosened and thrown up by street cars and carried onto the sidewalks by pedestrians, nor is the fact that it is so thrown to the sides and crossings.[7] And the defect, in order to come within the Massachusetts statutes, must be remediable by reasonable care and attention or diligence.[8] It is therefore necessary, before any liability can attach, that there should be a breach of duty anterior to the accident, something unusual or dangerous to travel,[9] of which the authorities have notice,[10] the duty only then becoming imperative, the assumption of power raising the duty above a mere discretion and making it obligatory and absolute.[11] Each case must therefore be de-

[1] Michigan City v. Boeckling, 122 Ind. 39; Todd v. Troy, 61 N. Y. 506; Dubois v. Kingston, 102 N. Y. 219, 55 Am. Rep. 804; Pomfrey v. Saratoga Springs, 104 N. Y. 459; Evans v. Utica, 69 N. Y. 166; Conrad v. Ithaca, 16 N. Y. 158; Weed v. Balston Spa, 76 N. Y. 329; Requa v. Rochester, 45 N. Y. 128; Hines v. Lockport, 50 N. Y. 236; Saulsbury v. Ithaca, 94 N. Y. 27, 46 Am. Rep. 122; Keith v. Brockton, 136 Mass. 119; Kirby v. Boylston Market Assn., 14 Gray, 249, 74 Am. Dec. 682; Loker v. Brookline, 13 Pick. 343, decided under Mass. Stat. ch. 25, §§ 1, 3, 24; Landolt v. Norwick, 37 Conn. 615; Cloughessey v. Waterbury, 51 Conn. 405, 50 Am. Rep. 38; Chase v. Cleveland, 44 Ohio St, 505, 58 Am. Rep. 843; McKean v. Salem, 148 Mass. 109.

[2] Michigan City v. Boeckling, 122 Ind. 39; Hayes v. Cambridge, 136 Mass. 402; Burr v. Plymouth, 48 Conn. 460; Winne v. Albany, 39 N. Y. S. R. 603; McKean v. Salem, 148 Mass. 109; Tracy v. Poughkeepsie, 46 Hun, 569; Kinney v. Troy, 108 N. Y. 567, 38 Hun, 285, reversed; Todd v. Troy, 61 N. Y. 506.

[3] Smith v. Brooklyn, 107 N. Y. 655, 36 Hun, 224.

[4] Michigan City v. Boeckling, 122 Ind. 39; McDonald v. City of Toledo, U. S. C. C., N. D. (Ohio), June 1894, 1 Toledo L. N. 244; Battersby v. New York, 7 Daly, 16; Landolt v. Norwich, 37 Conn. 615; Blake v. Lowell, 143 Mass. 296, decided under Mass. Stat. 1877, ch. 237, § 2, page 52, Public Stat. 18; Burr v. Plymouth, 48 Conn. 460; Rogers v. Newport, 62 Me. 101, so passable as to be safely and conveniently traveled; Chicago v. McGiven, 78 Ill. 347; City of Gilliam, 30 Pitts. L. J. 461; Hayes v. Cambridge, 136 Mass. 402.

[5] City of Michigan v. Boeckling, 122 Ind. 39; Rogers v. Newport, 62 Me. 101; Chicago v. McGiven, 78 Ill. 347; Landolt v. Norwich, 37 Conn. 615.

[6] Kling v. City of Buffalo, 72 Hun, 541; McDonald v. City of Toledo, U. S. C. C., N. D. (Ohio), June, 1894, 1 Toledo L. N. 244; Hausmann v. Madison, 85 Wis. 187; Battersby v. New York, 7 Daly, 16; Landolt v. Norwich, 37 Conn. 615; Blake v. Lowell, 143 Mass. 296; Cloughessey v. Waterbury, 51 Conn. 405, 50 Am. Rep. 38; Hall v. Lowell, 10 Cush. 260; Chase v. Cleveland, 44 Ohio St. 58 Am. Rep. 843; Gibson v. Johnson, 4 Ill. App. 288; Taylor v. Yonkers, 105 N. Y. 202, 59 Am. Rep. 492; Tracey v. Poughkeepsie, 46 Hun, 569; Grossenbach v. Milwaukee, 65 Wis. 31, 56 Am. Rep. 614; Ward v. Jefferson, 24 Wis. 342.

[7] Chicago v. Bixby, 84 Ill. 82, 25 Am. Rep. 429; Nason v. Boston, 14 Allen, 508; Hutchinson v. Ypsilanti, 103 Mich. 12.

[8] Hayes v. Cambridge, 136 Mass. 402.

[9] Harrington v. Buffalo, 121 N. Y. 147; Damon v. Boston, 149 Mass. 147; Hayes v. Cambridge, 136 Mass. 402; Winne v. Albany, 39 N. Y. S. R. 603; Michigan City v. Boeckling, 122 Ind. 39; Bell v. New York, 31 Neb. 842.

[10] Harrington v. Buffalo, 121 N. Y. 147; Foley v. Troy, 45 Hun, 396; Tracey v. Poughkeepsie, 46 Hun, 569.

[11] Hunt v. New York, 109 N. Y. 134; Harrington v. Buffalo, 121 N. Y. 147; Baltimore v. Marriott, 9 Md. 160; Collins v. Council Bluffs, 32 Iowa, 324, 7 Am. Rep. 200.

cided according to its own particular circumstances; the mere fact that snow or ice is upon the walk is not sufficient; due regard must be had to the rigor of the climate, and to the fact that the condition was the result of natural causes, the mere fact of a person's falling not being sufficient; the main question involved in the case being the reasonably safe condition of the walk for travel,[12] as conditions produced by natural causes, or by the laws of gravitation and temperature are not defects.[13] In order to create liability an obstruction must be proved, a mere accumulation not being enough, the obligation to remove obstructions arising from the obligation to repair.[14] It must also be shown that the municipal authorities had notice thereof, either express or implied, from lapse of time. Actual notice will be inferred from the fact that knowledge of a defect might have been obtained by the exercise of due and ordinary care,[15] or from facts establishing a violation of a city ordinance,[16] or from the long continued existence of the defect,[17] or of observable danger,[18] or from the fact that snow fell upon a given date, but not after another date, the accident happening after the latter through the prior fall,[19] or from the fact that many accidents have happened at the same place.[20] So evidence that the danger existed for a long period may be sufficient constructive notice.[21] The occurrence of a snow storm has been held sufficient where the sidewalk has been defective.[22] So has the obstruction of the original road by snow and the temporary road giving way by reason of a thaw.[23] So has the customary report of the patrolman to the inspector, the duty of the latter being to report to headquarters,[24] as has also the report of the officer on the beat given the day before the accident, although notice to the foreman of road commissioners is not enough.[25] Such notice, however, will not be inferred from the fact that an accident happened two years before, at the same place.[26] In some jurisdictions, however, the State statutes call for notice of the specific defect, the admissions of officials not being enough, and the provisions of such statute must be complied with,[27] but under other statutes a notice, though not quite accurate, is sufficient if the description is only, provided attention be called to the condition which causes the accident,[28] and it is sufficient if the locality be mentioned with substantial accuracy.[29] So it would also seem that such notice is sufficient even though the place mentioned is different to that of the ac-

[12] Hubbard v. Concord, 35 N. H. 52, 69 Am. Dec. 520; Gosport v. Evans, 112 Ind. 135; Kavenny v. Troy, 108 N. Y. 571; Landolt v. Norwich, 37 Conn. 615; Dooley v. Meridan, 44 Conn. 117, 26 Am. Rep. 433; Congdon v. Norwich, 37 Conn. 419; Cloughessey v. Waterbury, 51 Conn. 415, 50 Am. Rep. 35; McQueen v. Elkhart, 14 Ind. App. 671; Beekman v. New York, 18 Misc. Rep. 509; Todd v. Troy, 61 N. Y. 506; Winnie v. Albany, 39 N. Y. S. R. 603; Hall v. Lowell, 10 Cush. 260; Chase v. Cleveland, 44 Ohio St. 505, 58 Am. Rep. 843; Hayes v. Cambridge, 136 Mass. 402; Broburg v. Des Moines, 63 Iowa, 523, 50 Am. Rep. 756; Bell v. York, 31 Neb. 842; Muller v. Newberg, 105 N. Y. 668; Hubbard v. Concord, 35 N. H. 52, 69 Am. Dec. 520; Johnson v. Haverhill, 35 N. H. 84; Smith v. Brooklyn, 107 N. Y. 655, 36 Hun, 224; Scoville v. Salt Lake City (Utah), 39 Pac. Rep. 481.

[13] Hausmann v. Madison, 85 Wis. 187; Gavett v. Jackson (Mich.), 67 N. W. Rep. 517.

[14] Boulder v. Niles, 9 Colo. 415; Aurora v. Parks, 21 Ill. App. 459; Collins v. Council Bluffs, 32 Iowa, 324, 7 Am. Rep. 200; Loker v. Brookline, 13 Pick. 343; McKean v. Salem, 148 Mass. 109; Shea v. Lowell, 8 Allen, 136; How. Stat. Mich. §§ 1442 1446; McKellar v. Detroit, 27 Mich. 158, 58 Am. Rep. 357; Nebraska City v. Rathbone, 20 Neb. 288; Foxworthy v. Hastings, 23 Neb. 772; Foley v. Foley, 45 Hun, 396; Tracey v. Poughkeepsie, 46 Hun, 569; Requa v. Rochester, 45 N. Y. 128; Hines v. Lockport, 50 N. Y. 236; Todd v. Troy, 61 N. Y. 506; Evans v. Utica, 69 N. Y. 166; Conrad v. Ithaca, 16 N. Y. 158; Weed v. Balston Spa, 76 N. Y. 329; Spaulding v. Ithaca, 94 N. Y. 27, 46 Am. Rep. 122; Dubois v. Kingston, 102 N. Y. 219, 55 Am. Rep. 804; Pomfrey v. Saratoga Springs, 104 N. Y. 459; Bly v. Whitehead, 120 N. Y. 506; Harrington v. Buffalo, 121 N. Y. 147; Chase v. Cleveland, 44 Ohio St. 505, 58 Am. Rep. 843.

[15] Boulder v. Niles, 9 Colo. 415; York v. Spellman, 19 Neb. 383; Lincoln v. Smith, 28 Neb. 762; Spaulding v. Beverly (Mass.), 45 N. E. Rep. 1.

[16] Reich v. New York, 12 Daly, 72; Corbett v. Troy, 53 Hun, 208; McLaughlin v. Corry, 77 Pa. 108, 18 Am. Rep. 432.

[17] Troxel v. Vinton, 77 Iowa, 90; Waldron v. St. Paul, 33 Minn. 87; Lincoln v. Smith, 28 Neb. 762; Gilbrie v. Lockport, 122 N. Y. 403.

[18] McLaughlin v. Corry, 77 Pa. 108, 18 Am. Rep. 432.

[19] Foley v. Troy, 45 Hun, 396.

[20] Columbia v. Armes, 107 U. S. 519, 27 L. Ed. 418.

[21] Tracey v. Poughkeepsie, 46 Hun, 569.

[22] Corts v. District of Columbia, 7 Mackay, 277.

[23] Savage v. Bangor, 40 Me. 176, 63 Am. Dec. 658.

[24] Twogood v. New York, 102 N. Y. 216; Hawley v. Gloversville, 4 N. Y. App. Div. 343. *Aliter*, when no duty imposed, Columbus v. Ogletree, 96 Ga. 177.

[25] Blake v. Lowell, 143 Mass. 296; Rich v. Rockland, 87 Me. 188.

[26] Gilbrie v. Lockport, 122 N. Y. 403.

[27] Me. Stat. of 1877, ch. 206; Smyth v. Bangor, 72 Me 249; Crocker v. Hartford, 66 Conn. 387.

[28] Mass. Stat. 1882, ch. 36; Spellman v. Chicopee, 131 Mass. 443; Canterbury v. Boston, 141 Mass. 215; Bailey v. Everett, 132 Mass. 441; Dalton v. Salem, 136 Mass. 215.

[29] Hughes v. Lawrence (Mass.), 36 N. E. Rep. 485.

cident, provided there be no intention to deceive or mislead.[30] Where, however, there is a particular accumulation, express notice has been held necessary.[31] The long continuance of the defect or obstruction, if proved, may be sufficient, actual or constructive notice.[32] The failure to remove after such notice is the foundation of the liability of the municipality.[33] Inasmuch, however, as such unusual and exceptional conditions are sufficient to charge the municipality with notice, so also they are notice to the pedestrian of the danger he encounters or may naturally expect,[34] and, therefore, the maxim *volenti non fit injuria*, applies to the traveler who must use ordinary care and prudence, and must not be in fault or encounter the danger or be guilty of any contributory negligence.[35] He must take the middle of the road if it is safe,[36] and the conduct of the traveler is to be tried by that of ordinary intelligent and prudent persons in like circumstances, and if the risk would not have been taken by such persons he cannot recover.[37] Yet if the condition is not such as to make the road practically impassible, there is no contributory negligence.[38] So the mere fact of his knowledge is not contributory negligence *per se*,[39] and knowledge of a defect does not preclude his recovery, it being merely an incident for the consideration of the jury as to the exercise of due care,[40] as it is not conclusive evidence of negligence.[41] The question, however, is one for the determination of the jury, the burden of proof of freedom from such negligence being upon the traveler.[42] The fact, however, of an improper construction will not assist him,[43] although if the authorities have been guilty of gross negligence, such negligence on his part will not relieve them.[44]

The place where the accident happened must be an improved open space, a public street or sidewalk, under the control of the city authorities,[45] of which fact the jury must be satisfied.[46] The question of the safety of the sidewalk must be duly considered by the jury,[47] and their attention must also be called to the essential features with sufficient explicitness;[48] the nature of the route and of the travel, the character of the ground, the ability of the authorities and their opportunities to repair, and the storm must also be considered by them;[49] if there is a permanent cause[50] it must be noticed. The question of constructive notice must also be dwelt upon by them,[51] as must the negligence

[30] Hughes v. Lawrence (Mass.), 36 N. E. Rep. 485; Gardner v. Weymouth, 155 Mass. 595; Spellman v. Chicopee, 131 Mass. 443; Fontin v. Easthampton, 142 Mass. 486; Canterbury v. Boston, 141 Mass. 215.

[31] McKellar v. Detroit, 57 Mich. 158, 58 Am. Rep. 357.

[32] Emporia v. Schmidling, 33 Kan. 485; Jansen v. Atchison, 16 Kan. 358; Riggs v. Florence, 27 Kan. 194; Salina v. Trosper, 27 Kan. 545; Blakeley v. Troy, 18 Hun, 167; Springer v. Philadelphia, 22 W. N. C. 132; Hansom v. Warren, 22 W. N. C. 133; Miller v. Newburgh, 105 N. Y. 668; Ward v. Jefferson, 24 Wis. 342; Grossenbach v. Milwaukee, 65 Wis. 31, 56 Am. Rep. 614.

[33] Gaylord v. New Britain, 58 Conn. 398.

[34] McDonald v. City of Toledo, U. S. C. C., N. D. (Ohio), June 1, 1894, 1 Toledo L. N. 244.

[35] Chicago v. Smith, 48 Ill. 107; Kewance v. Depew, 80 Ill. 119; Quincy v. Barker, 81 Ill. 300, 25 Am. Rep. 278; Macomb v. Smithers, 6 Ill. App. 470; Chicago v. Bixby, 84 Ill. 82, 25 Am. Rep. 429; Wilson v. Charlestown, 8 Allen, 137; Durkin v. Troy, 61 Barb. 437; Evans v. Utica, 69 N. Y. 166, 25 Am. Rep. 165; Kling v. City of Buffalo, 72 Hun, 541; Hubbard v. Concord, 35 N. H. 52, 69 Am. Dec. 520; Schaefler v. Sandusky, 33 Ohio St. 246, 31 Am. Rep 533; McLaughlin v. Corry, 77 Pa. 109, 18 Am. Rep. 432; Dehnhardt v. Philadelphia, 15 W. N. C. 214; Erie v. Magill, 101 Pa. 636, 47 Am. Rep. 739, 2 Am. & Eng. Corp. Cas. 579; Hampson v. Taylor, 15 R. I. 83; Actenhagen v. Watertown, 18 Wis. 331, 86 Am. Dec. 769; Hopkins v. Rush River, 70 Wis. 10; Hausmann v. Madison, 85 Wis. 187.

[36] Cosner v. Centerville (Iowa), 57 N. W. Rep. 636.

[37] McGuinness v. Worcester (Mass.), 35 N. E. Rep. 1068.

[38] Corts v. District of Columbia, 7 Mackey, 277; Evans v. Utica, 69 N. Y. 166, 25 Am. Rep. 165.

[39] Evans v. Utica, 169 N. Y. 166, 25 Am. Rep. 65.

[40] McGuinness v. City of Worcester (Mass.), 35 N. E. Rep. 1068, and cases cited; Byerby v. City of Anamosa, 79 Iowa, 206; Rice v. City of Des Moines, 40 Iowa, 642; Parkill v. Town of Brighton, 61 Iowa, 108; McGinty v. City of Keokuk, 66 Iowa, 727; Walker v. Decatur City, 67 Iowa, 308; Hartman v. City of Muscatine, 70 Iowa, 511.

[41] McGuinness v. City of Worcester (Mass.), 35 N. E. Rep. 1068, and cases cited.

[42] Cosner v. Centerville (Iowa), 57 N. W. Rep. 636; Fernbach v. City of Waterloo, 76 Iowa, 509.

[43] Chicago v. Bixby, 84 Ill. 82, 25 Am. Rep. 429; Schaefler v. Sandusky, 33 Ohio St. 246, 31 Am. Rep. 533.

[44] Chicago v. Smith, 48 Ill. 107; Kewance v. Depew, 80 Ill. 119.

[45] Chase v. Cleveland, 44 Ohio St. 505, 58 Am Rep. 483; Sheff v. Huntington, 16 W. Va. 307; Chapman v. Milton, 31 W. Va. 384.

[46] Sheff v. Huntington, 16 W. Va. 307; Chapman v. Milton, 31 W. Va. 384.

[47] Seeley v. Litchfield, 40 Conn. 134, 44 Am. Rep. 213; Hall v. Lowell, 10 Cush. 260; McGuinness v. Worcester (Mass.), 35 N. E. Rep. 1068.

[48] Hughes v. Lawrence (Mass.), 36 N. E. Rep. 485.

[49] Boulder v. Niles, 9 Colo. 415; Burr v. Plymouth, 48 Conn. 460; Gerald v. Boston, 108 Mass. 580; Hubbard v. Concord, 35 N. H. 52, 69 Am. Dec. 520.

[50] Post v. Boston, 141 Mass. 189; Olson v. Worcester, 142 Mass. 536.

[51] Woolsey v. Ellensville, 39 N. Y. S. R. 744.

of the authorities in not removing the obstruction.[52] In fact, the case must be determined by the jury according to all its circumstances,[53] they being charged upon all the facts and instructed in the law applicable thereto.[54] The corporation must have a reasonable time and opportunity to remove the obstruction,[55] and may wait such time to see whether the property owners comply with the terms of the city ordinance,[56] the question of reasonableness being for the jury, according to the facts and circumstances,[57] but forty-eight hours is not a reasonable time,[58] although it has been held that operations may be postponed until a thaw where the storm has been severe followed by weather of a like nature.[59] So, too, it must be proved that the obstruction was such as to render the walk unsafe,[60] it must be an obstruction, or ridge or irregularity sufficient to trip a person;[61] there must be a defect,[62] and it must not be unsafe and dangerous, not easily or readily apparent to one using ordinary care,[63] and under the Michigan statutes a mere accumulation is not sufficient.[64] The importance of the way and the town's means must also be taken into consideration.[65] A mere accumulation of snow or ice may become a dangerous and a defective obstruction and condition so as to render the city liable,[66] provided that it is the proximate cause of the injury,[67] as where it is allowed to remain so as to form ridges, or become rough, irregular or uneven, whether caused by artificial means or by slipperiness, so as to form an obstacle to travel, a defect being created thereby, for which the authorities are liable,[68] as they must exercise reasonable care and prudence and allow no defects,[69] negligence in the con-

[52] Glantz v. South Bend, 106 Ind. 305; Michigan City v. Boeckling, 122 Ind. 39; Jansen v. Atchinson, 16 Kan. 358; Foxworthy v. Hastings, 25 Neb. 133; Goodfellow v. New York, 100 N. Y. 15; Todd v. Troy, 61 N. Y. 506; Bishop v. Goshen, 120 N. Y. 337; Boulder v. Niles, 9 Colo. 415; Hill v. Fond du Lac, 56 Wis. 242.

[53] Burr v. Plymouth, 48 Conn. 460; Gerald v. Boston, 108 Mass. 580; Hubbard v. Concord, 35 N. H. 52, 69 Am. Dec. 520; Allison v. Middleton, 101 N. Y. 667; Bishop v. Goshen, 120 N. Y. 337; Hill v. Fon du Lac, 56 Wis. 242.

[54] Stilling v. Thorp, 54 Wis. 528, 41 Am. Rep. 60.

[55] Hartford v. Talcott, 48 Conn. 532, 40 Am. Rep. 189; Broburg v. Des Moines, 63 Iowa, 523, 50 Am. Rep. 756; Cosner v. Centerville (Iowa), 57 N. W. Rep. 636; McKellar v. Detroit, 27 Mich. 158, 58 Am. Rep. 357; Payne v. Lowell, 10 Allen, 147; Foxworthy v. Hastings, 25 Neb. 133; Hubbard v. Concord, 35 N. H. 52, 69 Am. Dec. 520; Johnson v. Haverhill, 35 N. H. 84; Harrington v. Buffalo, 121 N. Y. 147; Peard v. Mt. Vernon, 83 Hun, 250; Requa v. Rochester, 45 N. Y. 136; O'Connor v. New York, 29 N. Y. S. R. 502; Kinney v. Troy, 108 N. Y. 567; Taylor v. Yonkers, 105 N. Y. 202, 59 Am. Rep. 492; Kavenny v. Troy, 108 N. Y. 571; Keane v. Waterford, 29 N. Y. S. R. 340; Smith v. Chicago, 38 Fed. Rep. 388; Dorn v. Oyster Bay, 84 Hun, 510; McDonald v. Toledo, 63 Fed. Rep. 60.

[56] Calder v. City of Walla Walla, Wash. Sup. Ct. May 23, 1893.

[57] Hayes v. Cambridge, 136 Mass. 402; Keane v. Waterford, 29 N. Y. S. R. 340.

[58] O'Connor v. New York, 29 N. Y. S. R. 502.

[59] Betts v. Gloversville, 29 N. Y. S. R. 331; Winne v. Albany, 39 N. Y. S. R. 603; Taylor v. Yonkers, 105 N. Y. 202, 59 Am. Rep. 492.

[60] McKean v. Salem, 148 Mass. 109; Whitman v. Groveland, 131 Mass. 553.

[61] Henkes v. Minneapolis, 42 Minn. 520; Wyman v. Philadelphia, 175 Pa. 117.

[62] Miller v. Newburgh, 105 N. Y. 668; Quincy v. Barker, 81 Ill. 300, 25 Am. Rep. 278; Wyman v. Philadelphia, 175 Pa. 117.

[63] Macomb v. Smithers, 6 Ill. App. 470; Aurora v. Pulfer, 56 Ill. 270; Smith v. Chicago, 38 Fed. Rep. 388; Smid v. New York, 17 Jones & S. 126.

[64] McKellar v. Detroit, 57 Mich. 158, 58 Am. Rep. 357; How. Ann. Stat. §§ 1442 1446.

[65] Congdon v. Norwick, 37 Conn. 419; Burr v. Plymouth, 48 Conn. 460; Cloughessey v. Waterbury, 51 Conn. 405, 50 Am. Rep. 38.

[66] Congdon v. Norwick, 37 Conn. 419; Chicago v. McGiven, 78 Ill. 347; Aurora v. Parks, 21 Ill. App. 459; Henkes v. Minneapolis, 42 Minn. 530; Muller v. Newburgh, 105 N. Y. 668; Cloughessey v. Waterbury, 51 Conn. 405, 50 Am. Rep. 38; West v. Eau Claire, 89 Wis. 31.

[67] Rogers v. Newport, 62 Mo. 101.

[68] Providence v. Clapp, 58 U. S. 17 How. 161, 15 L. Ed. 72; Dooley v. Meriden, 44 Conn. 117, 26 Am. Rep. 433; Gaylord v. New Britain, 58 Conn. 398, 8 L. R. A. 752; City of Chicago v. McGiven, 78 Ill. 347; Huston v. Council Bluffs (Iowa), 69 N. W. Rep. 1130; Broburg v. Des Moines, 63 Iowa, 523, 50 Am. Rep. 756; Collins v. Council Bluffs, 32 Iowa, 324, 7 Am. Rep. 200; Stone v. Hubbardston, 100 Mass. 49; Street v. Holyoke, 105 Mass. 82, 7 Am. Rep. 500; Day v. Minford, 5 Allen, 98; Morn v. Boston, 109 Mass. 446; Luther v. Worcester, 97 Mass. 268; Hutchinson v. Boston, 97 Mass. 272; Fitzgerald v. Woburn, 109 Mass. 204; McAuley v. Boston, 113 Mass. 503; Williams v. Lawrence, 113 Mass. 506, note; McKean v. Salem, 148 Mass. 109; Henkes v. Minneapolis (Minn.), 44 N. W. Rep. 1026; Corbett v. Troy, 53 Hun, 228; Chase v. Cleveland (Ohio), 19 N. E. Rep. 225; McLaughlin v. Corry, 77 Pa. 109, 18 Am. Rep. 432; Mauch Chunk v. Kline, 100 Pa. 119, 45 Am. Rep. 364; Dehnhardt v. Philadelphia, 15 W. N. C. 214; Fry v. Borough, 4 Pa. Co. Ct. 604; Calder v. City of Walla Walla, 6 Wash. 377, May 23, 1893; Cook v. Milwaukee, 24 Wis. 274, 1 Am. Rep. 183; McDonald v. Ashland, 78 Wis. 251; Paulson v. Pelican, 79 Wis. 445; Hughes v. Lawrence, 160 Mass. 474; Duroche v. Cornwall, 23 Ont. 355.

[69] Centralia v. Krouse, 64 Ill. 19; Congdon v. Norwick, 37 Conn. 414; Hutchins v. Boston, 97 Mass. 272; Luther v. Worcester, 97 Mass. 268; Chicago v. Smith, 48 Ill. 107; Street v. Holyoke, 105 Mass. 82, 7 Am. Rep. 500; Gilbert v. Roxbury, 100 Mass. 185; McLaughlin v. Corry, 77 Pa. 100, 18 Am. Rep. 432; Cook v. Milwaukee, 24 Wis. 270, 1 Am. Rep. 183; Providence v. Clapp, 58 U. S. 17 How. 165, 15 L. Ed. 74; Gibson v. Johnson, 4 Ill. App. 288; Ward v. Jefferson, 24 Wis

struction of the sidewalk rendering them liable.[70] Such defect or negligence must, however, be the *causa causans*.[71] If the walk with its defects, together with such snow as ordinarily falls is unsafe, liability attaches,[72] but it is otherwise if the way is not dangerous *per se*, and the defect is discoverable,[73] and if the way is reasonably safe and used daily.[74] A glasslight in a sidewalk has been held no defect.[75] From the above it will be found that the mere fact of slipperiness upon a level surface, free from defects, is not of itself sufficient to charge the authorities with negligence in the absence of any such particular condition,[76] slipperiness not being *per se* a defect,[77] although if special causes exist for the creation of such formations it is otherwise, and the authorities may be liable,[78] the question in each case being for the jury.[79] Where the question of new formations arises, it must be shown that the old formation was the contributing or concurring cause of the accident, a claim founded upon the new formation alone not being sufficient,[80] the fact being properly brought home to the jury,[81] evidence of the prior condition being refused where the claim was based upon an accumulation existing at the time of the accident.[82] In some cases the authorities have been held responsible, when assisting causes have contributed to the accident, negligence on their part being proved where they have neglected to remove an accumulation which such causes added. Thus they have been held liable where the assisting cause was an imperfect conductor from a house roof,[83] a defective waterspout added to an imperfect sidewalk;[84] snow falling from a barn roof and allowed to remain;[85] ice formed from roof dripping;[86] a water conductor;[87] negligence being inferred from them by the jury.[88] But yet when the contributing cause was ice formed

342; Grossenbach v. Milwaukee, 65 Wis. 31, 56 Am. Rep. 614; Quincy v. Barker, 81 Ill. 300, 25 Am. Rep. 278; Cloughessey v. Waterbury, 51 Conn. 405, 50 Am. Rep. 38.

[70] Macomb v. Smith, 6 Ill. App. 470; Atchison v. King, 9 Kan. 550; Pinkham v. Topsfield, 104 Mass. 78; Fitzgerald v. Woburn, 109 Mass. 204; Billings v. Worcester, 102 Mass. 329, 3 Am. Rep. 400; Adams v. Chocopee, 147 Mass. 440; McKellar v. Detroit, 57 Mich. 158, 58 Am. Rep. 357; Lincoln v. Smith, 28 Neb. 762; McDonald v. Philadelphia, 12 Pa. Co. Ct. 672; Mauch Chunk v. Kline, 100 Pa. 119, 45 Am. Rep. 364; Decker v. Scranton, 151 Pa. 241; Hampson v. Taylor, 15 R. I. 83; Perkins v. Fon du Lac, 34 Wis. 435; Grossenbach v. Milwaukee, 65 Wis. 31, 56 Am. Rep. 614; Hill v. Fon du Lac, 56 Wis. 248; Stilling v. Thorp, 54 Wis. 537, 41 Am. Rep. 60; Chamberlaine v. Oshkosh, 84 Wis. 289.

[71] Chamberlaine v. Oshkosh, 84 Wis. 289.

[72] Lincoln v. Smith, 28 Neb. 762.

[73] Gosport v. Evans, 112 Ind. 136.

[74] Lyon v. Logansport (Ind. App.), Nov. 29, 1892.

[75] Chicago v. McGiven, 78 Ill. 347.

[76] Boulder v. Niles, 9 Colo. 415; Gibson v. Johnson, 4 Ill. App. 288; Aurora v. Parks, 21 Ill. App. 459; Chicago v. McGiven, 78 Ill. 347; Chicago v. Bixby, 84 Ill. 82, 25 Am. Rep. 429; Broburg v. Des Moines, 63 Iowa, 523, 50 Am. Rep. 756; Smyth v. Bangor, 72 Me. 249; Stanton v. Springfield, 12 Allen, 566; Hutchins v. Boston, 12 Allen, 571; Johnson v. Lowell, 12 Allen, 572; Mason v. Boston, 14 Allen, 508; Luther v. Worcester, 97 Mass. 268; Stone v. Hubbardston, 100 Mass. 49; Gilbert v. Roxbury, 100 Mass. 185; Billings v. Worcester, 102 Mass. 329; Pinkham v. Topsfield, 104 Mass. 78; Hayes v. Cambridge, 136 Mass. 402; McKean v. Salem, 148 Mass. 109; Hughes v. City of Lawrence, 160 Mass. 474; McGuinness v. City of Worcester, 160 Mass. 272; McKellar v. Detroit, 57 Mich. 158, 58 Am. Rep. 357; Gavett v. Jackson (Mich.), 67 N.W. Rep. 517; Henkes v. Minneapolis, 42 Minn. 530; Bell v. York, 31 Neb. 842; Nebraska City v. Rathbone, 20 Neb. 288; Foxworthy v. Hastings, 23 Neb. 772; Anthony v. Glens Falls, 4 N. Y. App. Div. 323; Buck v. Glens Falls, 4 N. Y. App. Div. 323; Todd v. Troy, 61 N. Y. 506; Corbett v. Troy, 53 Hun, 228; Kinney v. Troy, 108 N. Y. 567; Urquhart v. Ogdensburg, 91 N. Y. 67, 43 Am. Rep. 655; Foley v. Troy, 45 Hun, 396; Tracey v. Poughkeepsie, 46 Hun, 569; Taylor v. Yonkers, 105 N. Y. 202, 59 Am. Rep. 492; Muller v. Newburgh, 32 Hun, 24, 105 N. Y. 668; Smith v. Brooklyn, 36 Hun, 224, 107 N. Y. 655; Chase v. Cleveland, 44 Ohio St. 505, 58 Am. Rep. 843; Wyman v. Philadelphia, 175 Pa. 117; Mauch Chunk v. Kline, 100 Pa. 119, 45 Am. Rep. 364; Calder v. City of Walla Walla, 6 Wash. 377, May 23, 1893; Cook v. Milwaukee, 24 Wis. 270, 1 Am. Rep. 183; Ward v. Jefferson, 24 Wis. 342; Grossenbach v. Milwaukee, 65 Wis. 31, 56 Am. Rep. 614; Schroth v. Prescott, 63 Wis. 652; Hausmann v. Madison, 85 Wis. 187.

[77] Stanton v. Springfield, 12 Allen, 566; Hutchins v. Boston, 12 Allen, 571; Johnson v. Lowell, 12 Allen, 572; Gavett v. Jackson (Mich.), 67 N. W. Rep. 517.

[78] Hughes v. City of Lawrence, 160 Mass. 474; Adams v. Chicopee, 147 Mass. 440; Spellman v. Chicopee, 131 Mass. 443; Fitzgerald v. Woburn, 109 Mass. 205; Pinkham v. Topfield, 104 Mass. 78; Stanton v. Springfield, 12 Allen, 566; Durochie v. Cornwall, 23 Ont. 355.

[79] Nebraska City v. Rathbone, 20 Neb. 288; Foxworthy v. Hastings, 23 Neb. 772.

[80] Masters v. Troy, 50 Hun, 485; Tobey v. Hudson, 49 Hun, 318; Pomfrey v. Saratoga Springs, 104 N. Y. 460; Taylor v. Yonkers, 105 N. Y. 202, 59 Am. Rep. 492; Johnson v. Glens Falls, 41 N. Y. S. R. 820; Lawless v. Troy, 44 N. Y. S. R. 735; Harrington v. Buffalo, 121 N. Y. 147; Ayres v. Hammondsport, 130 N. Y. 665; McNally v. Cohoes, 127 N. Y. 350.

[81] Johnson v. Glens Falls, 41 N. Y. S. R. 820; Scoville v. Salt Lake City (Utah), 39 Pac. Rep. 481.

[82] Woodcock v. Worcester, 138 Mass. 268.

[83] Hall v. Lowell, 10 Cush. 260.

[84] Gilbrie v. Lockport, 122 N. Y. 403.

[85] Todd v. Troy, 61 N. Y. 506; Pomfrey v. Saratoga Springs, 104 N. Y. 459.

[86] Kavenny v. Troy, 108 N. Y. 571; Kane v. Waterford, 29 N. Y. S. R. 340; Hixon v. Lowell, 79 Mass. 9.

[87] Olson v. Worcester, 142 Mass. 536.

[88] Kane v. Waterford, 29 N. Y. S. R. 340.

from water pumped from a fire engine, they were not held responsible.[89] Neither were they considered liable where the ice formed from drippings from a private awning,[90] although where the snow and ice fell from an awning extending across the sidewalk and accumulated thereon, they were held responsible.[91] So their non-liability for natural flowing and spreading of water as it came from conductors has been recognized,[92] as has also their irresponsibility for ice formed by reason of water from an eaves trough which sagged thereby causing water to flow, to conduct which a pipe had been laid from the sag, the water still overflowing part of the sidewalk.[93]

J. E. WESTON.

[89] Cook v. Milwaukee, 27 Wis. 191.
[90] Hanson v. Warren (Pa.), May 25, 1888.
[91] Drake v. Lowell, 13 Met. 292.
[92] Hughes v. Lawrence, 160 Mass. 481.
[93] Gavett v. Jackson (Mich.), 67 N. W. Rep. 517.

MASTER AND SERVANT—INDEPENDENT CONTRACTORS—INJURIES TO THIRD PERSONS—BALLOON ASCENSIONS.

SMITH v. BENICK.

Court of Appeals of Maryland, June 28, 1898.

Where the proprietor of a public place of amusement employed another to make a balloon ascension therefrom, who was free to exercise his own judgment as to the means of making it, and in inflating the balloon, the contractor used implements not contemplated by his employment, without the proprietor's knowledge, the proprietor was not liable for injuries sustained by a spectator through the use of such instrument.

PAGE, J.: The appeals in these cases are taken from judgments in favor of the appellees for injuries to Mary Benick alleged to have resulted from the negligence of the appellant in conducting a balloon ascension. The appellant was the lessee of a tract of land near Baltimore city. He had filled it up, as a pleasure resort, with bowling alleys, shooting gallery, and restaurant, and, besides, furnished various other attraction, such as fireworks, acrobatic performances, and other things of a like nature. These were extensively advertised, so that many persons were drawn thither; the daily attendance on week days averaging from 1,000 1,500 persons, and three times that number on Sunday. The proprietor charged no fee for admission, but relied for his profits from sales, the hiring of boats, and the rentals of places for carousal, shooting gallery, etc. Among other things designed to attract visitors were the balloon ascension, and it was at one of these that Mrs. Benick was injured. The ascension that day was conducted by a man named Hanna, who was an experienced and competent balloonist. Under his agreement with the appellant, "Hanna was to furnish and pay for all the material and appliances used in making the ascensions, and, in addition thereto, was to employ and pay all of the men required to conduct the ascensions;" and the appellant was to have no part to perform, except to furnish the field, pay the price, and name the hour for the ascension. The method of the ascension was that usually adopted: Two poles of proper height were first erected, and maintained in position by guy lines. A rope passed from the top of one pole to that of the other, and from this, by means of a loop, the balloon was kept in position while being inflated. When it was filled, the rope was loosened from one of the poles, and allowed to slip over the top of the balloon, thus releasing it. When the rope over the balloon (called the "ridge rope") is loosened, one of the poles falls to the ground. A guard rope, intended to keep the people off, is placed around and about the balloon. There was evidence that the guard rope inclosed a space on this occasion, about the balloon, in the shape of the lid of a coffin, so that, if the supporting poles did not fall in the larger portion of the space, they were of such length that, of necessity, they would fall outside. On the occasion of the accident the pole had fallen without causing injury (whether it fell inside of the inclosure or not there was no proof to show), and it was while the effort was being made to re-erect it that it fell, striking a carpenter's horse, and, bounding therefrom, injured Mrs. Benick.

By the terms of the contract already stated, the relation of Hanna to the appellant was that of an independent contractor. He was free "to exercise his own judgment and discretion as to the means and assistants he might think proper to employ about the work, exclusive of the control and direction in this respect" of the appellant. Deford v. State, 30 Md. 203. So regarding him, the general rules applicable are well settled: First, where an owner and proprietor of land employs a competent person to do work which of itself is not a nuisance, or of which the necessary or probable effect would not be to injure others, and such person is an independent contractor, the employer is not responsible for such negligence as is entirely collateral to, and not a probable consequence of, the work contracted for. Cooley, Torts, 547; Water Co. v. Ware, 16 Wall. 566; Deford v. State, *supra;* Railway Co. v. Moores, 80 Md. 348, 30 Alt. Rep. 643; Randleson v. Murray, 8 Adol. & E. 109. And, secondly, when a person is on the premises by invitation it is the duty of the occupant and owner to exercise due and reasonable care that his premises shall be reasonably safe, and that no concealed perils shall environ the visitor while he himself is acting in the exercise of due and reasonable care. Cooly. Torts, 718; Sweeny v. Railroad Co., 10 Allen, 372; Bennett v. Railroad Co., 102 U. S. 580; Powers v. Harlow, 53 Mich. 507, 19 N. W. Rep. 257; David v. Society, 129 Mass. 367. These rules are

succinctly stated in Pickard v. Smith, 10 C. B. (N. S.) 470, as follows: "If an independent contractor is employed to do a lawful act, and in the course of the work he or his servants commit some casual act of wrong or negligence, the employer is not answerable. * * * The rule, however, is not applicable to cases in which the act which occasions the injury is one which the contractor is employed to do; nor, by a parity of reasoning, in which the contractor is intrusted with the performance of a duty incumbent upon his employer, and neglects its fulfillment, whereby the injury is occasioned." The accident in this case is not attributable to any defect in the plan of ascension, nor to anything growing out of what was intended or was likely to occur in the usual process of sending up the balloon. The cause of it, the record shows, was proved to be as follows: "On the afternoon of the accident, August 29, 1895, the balloon was in process of inflation, and the two supporting poles were in position, when a violent thunder gust came up, and so disarranged the balloon as to cause it to veer over, and permit a supporting pole to fall to the ground, delaying the ascension, but causing no injury, and no proof was offered tending to show that the pole fell without the ropes. In order to get ready for a new inflation of the balloon after the thunder gust ceased, it became necessary to re-erect the fallen pole. A carpenter's horse was placed under it, at convenient stages, to support it in the elevation. When the top of the pole was at a height variously estimated from six or eight inches to five or six feet higher than the horse, it fell, striking the horse in its descent, which it probably upset, and slid or bounded to the ground. As it struck the ground, it either fell or bounded on the heel of the plaintiff Mary Benick, causing the injury complained of." It is not contended there was anything in the sending up of the balloon, or in the needed equipment for such an event, that created concealed dangers, from which it became the duty of the proprietor to shield the careless or unwary by the exercise of extraordinary precautions; and there is nothing in the record to show that, in the appointed and usual method of ascension, there was anything dangerous to persons using reasonable care. It is clear, however, from the admitted facts, as we have quoted them from the record, that Mrs. Benick received her injury in consequence of circumstances which did not involve the safety of the ordinary method. The poles had fallen without damage, and the operator then introduced, of his own accord, without the knowledge of the appellant, a new appliance, not contemplated by the usual method—that is, a carpenter's horse—and certainly not within any consent or agency of the appellant. If it was careless to make use of the horse, or if Hanna or his agents were guilty of carelessness in the manner in which it was used, the appellant cannot be held liable; it being shown that Hanna was an independent contractor.

The cases of Conradt v. Clauve, 93 Ind. 476, and Railway Co. v. Moores (Va.), 27 S. E. Rep. 70, relied on by the appellee, are distinguishable from this case. In the former the defendant was proprietor and manager of the fair grounds. Parts of the ground were allotted to target shooting. The plaintiff, being ignorant of the danger, hitched his horse where it was shot. Here was the concealed danger. The plaintiff was entitled to notice of it, for the reason that the defendant, in the discharge of his duty to make the place reasonably safe to those who came on his ground by invitation, was bound to notify them of dangerous places, and that not to do so was negligence. In the other case cited there was no guard rope, and no notification made that the poles would fall when the balloon went up. In Knottnerus v. Railway Co., 93 Mich. 348, 53 N. W. Rep. 529, a person was injured while on a roller coaster. It was said in the opinion of the court: "A roller coaster is not a snare or an explosive. It is, in and of itself, notice of its character and purpose. Its presence and operation involve no danger to those who keep away from it, nor does its enjoyment necessarily involve injury. It cannot be said that, by granting permission to operate a switch-back at North Park, the defendant was guilty of negligence. * * * They do not thereby become insurers of the persons while in attendance upon the attraction, or responsible for the carelessness of the operators." This case is cited as being pertinent to the questions involved.

It follows from what has been said that the court committed error in granting the plaintiffs' first prayer, and refusing the defendant's first and second. The judgment, therefore, must be reversed, and a new trial awarded. Judgment reversed, and new trial awarded.

NOTE.—The close character of the question involved in the principal case is revealed by the strong dissenting opinion of Bryan, J. After pointing out in what manner the accident, which caused the injuries to plaintiff might have been averted he says, "that a simple provision of this kind would have given adequate protection to the numbers assembled to witness the spectacle prepared for their amusement, while the neglect of it might cause the loss of many lives. To require that the proprietor of the grounds should furnish some protection of this kind could hardly be considered as imposing an onerous burden upon him. His duty under such circumstances is fully settled by a very great weight of authority." The result of the decided cases is well summarized in Cooley, Torts (2d Ed.), p. 718: "It has been stated in a preceding page that one is under no obligation to keep his premises in a safe condition for the visits of trespassers. On the other hand, when he expressly or by implication invites others to come upon his premises, whether for business or any other purpose, it is his duty to be reasonably sure that he is not inviting them into danger; and, to that end, he must exercise ordinary care and prudence to render the premises reasonably safe for the visit." Many illustrations are given by the learned author in the text and in the notes. Among other cases, he cites one where persons holding a fair, and erecting structures for the purpose, were held liable for injuries to their patrons caused by the breaking

down of the structures through such defects in construction as the exercise of proper care would have avoided. The possessor of land has no power to throw off this duty by making a contract with another person. As he cannot erect structures or perform feats fraught with danger to his visitors without taking due care for their safety, it follows by necessary consequence that he cannot employ or permit another person to do those things without providing the same safe-guards. He cannot give sanction to enact which would be unlawful if done by himself. He would be in every respect responsible for that which he employed another person to do. It would be his own act, with all its consequences and liabilities. On this point we may refer with profit to Pickard v. Smith 10 C. B. (N. S.) 470. Smith was the lessee and occupier of refreshment rooms, with a cellar attached, which was used for keeping coals. He employed a coal merchant to put a supply of coals in the cellar. The merchant, for that purpose, opened a trapdoor, and negligently left it open and unguarded, in consequence whereof the plaintiff, without any fault on his part, fell in and was injured. In delivering judgment for the plaintiff, the court said: "Unquestionably no one can be made liable for an act or breach of duty, unless it be traceable to himself, or his servant or servants, in the course of his or their employment. Consequently, if an independent contractor is employed to do a lawful act, and in the course of the work he or his servants commit some casual act of wrong or negligence, the employer is not answerable. To this effect are many authorities, which were referred to in the argument. That rule is, however, inapplicable to cases in which the act which occasions the injury is one which the contractor was employed to do; nor, by a parity of reasoning, to cases in which the contractor is intrusted with the performance of a duty incumbent upon his employer, and neglects its fulfillment, whereby an injury is occasioned. Now, in the present case the defendant employed the coal merchant to open the trap in order to put in the coals; and he trusted him to guard it whilst open, and to close it when the coals were all put in. The act of opening it was the act of the employer, though done through the agency of the coal merchant; and the defendant, having thereby caused danger, was bound to take reasonable means to prevent mischief. The performance of this duty he omitted, and the fact of this having intrusted it to a person who also neglected it furnishes no excuse, either in good sense or law." In Ellis v. Gas Co., 2 El. & Bl. 769, Lord Campbell said: "It would be monstrous, if the party causing another to do a thing were exempted from liability for that act, merely because there was a contract between him and the person immediately causing the act to be done." In Rapson v. Cubitt, 9 Mees. & W. 714, it was said: "The injuries done upon land or buildings are in the nature of nuisances, for which the occupier ought to be chargeable, when occasioned by any acts of persons whom he brings upon the premises. The use of the premises is confined by the law to himself, and he should take care not to bring persons there who do any mischief to others." All of these cases were cited with approval by this court in Deford v. State, 30 Md. 179. In this last case there was a full discussion at the bar and on the bench of the responsibilities of the possessors of real property. The wall of a house belonging to Deford had fallen, and killed a person who was passing along the street. Chief Justice Alvey, in an opinion of great fullness and ability, exhausted the whole subject. It was alleged that the wall was constructed in a most defective and dangerous manner. The learned judge said: "If this be so, it certainly constituted a nuisance, for which Deford would be liable. And the fact that the wall was erected by others, under contract, and to whom he did not bear the relation of master, will not excuse him; for, as was said by Lord Campbell in Ellis v. Gas Co., 2 El. & Bl. 767, it is a proposition absolutely untenable that in no case can a man be responsible for the act of a person with whom he has made a contract. If the contractor does the thing which he is employed to do, the employer is responsible for that thing, as if he did it himself. And, in all cases where a party is in possession of fixed property, he must take care that it is so used and managed that other persons shall not be injured; and whether it be managed by his own servants, or by contractors or their servants, makes no difference in respect to his liability. If a man has anything to be done on his own premises, he must take care to injure no man in the mode of conducting the work. Whether he injures a passenger in the street, or a servant employed about his work, seems to make no difference."

CORRESPONDENCE.

JUDGE WOOLSON'S BANKRUPTCY DECISION.

To the Editor of the Central Law Journal:

In your issue of Oct. 14, you copy from the "*Chicago Legal News*," an article purporting to give the gist of a decision of Judge Woolson of the United States Circuit Court for the Southern District of Iowa, on the involuntary feature of the recent bankruptcy legislation. The article is in error. Judge Woolson never made any such ruling. On a petition brought before him setting up about the facts your article mentions, Judge Woolson with much hesitancy issued a restraining order until a hearing could be had. No injunction was ever issued, and he holds that the federal court had no jurisdiction until a petition for involuntary bankruptcy is actually on file in his court, and so holds Judge Carlond of the Dakota court. Judge Woolson has been quite annoyed by this newspaper error.

Sioux City, Ia. W. H. FARNSWORTH.

JETSAM AND FLOTSAM.

PROTECTION OF THE RIGHT OF PRIVACY.

Mr. Guy H. Thompson has a valuable article on this topic in the last number of the CENTRAL LAW JOURNAL. In the concluding paragraph the distinction is shown between cases protected on the ground of nuisance to the person, and those in which we consider the right of privacy the fundamental feature. The line between the two, though in some instances finely drawn, yet, when once traced, becomes bold and distinct. The discomforts sought to be protected against in the case of the nuisance must be physical. It is necessary that one of the five senses be abused to set in motion a court of equity to restrain a nuisance to the person. On the other hand, we have seen that the right of privacy does not involve the physical man or his property, as that word is strictly defined and commonly used. It is only necessary that higher personality—the faculties of the mind, be wronged from having been brought into undesired and irritating publicity. This is the distinction as we conceive it."—*The Law Register.*

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions, and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

1. ACCIDENT INSURANCE—Risks and Causes of Loss.—Where one is insured against "personal bodily injuries, effected through external, violent and accidental means," and there is evidence tending to show that an injury received by the insured resulted from such means, the jury should determine, as a question of fact, whether the injury did result from accidental means. In the present case this issue was, under the charge of the court, fairly submitted to the jury, and there was sufficient evidence to sustain the finding.—ATLANTA ACCIDENT ASSN. V. ALEXANDER, Ga., 30 S. E. Rep. 939.

2. ASSIGNMENT — Assignee in Insolvency.—An assignee has no power to disallow a valid claim against the assignor for the reason that the owner of the claim has committed a fraud upon another creditor. Neither has he the power to allow the claim, and pay to the defrauded creditor the sum demanded by him.—KOHN V. HINE, Kan., 54 Pac. Rep. 117.

3. ATTACHMENT—Right of Lien Creditors to Defend.—Creditors of the defendant who have, subsequent to the attachment, acquired liens upon the attached property, cannot be let in to defend the suit and dispute the grounds of the attachment in lieu of the defendant. They can only defend against such imperfections as are unamendable and render the proceedings void.—WICHITA NAT. BANK V. WICHITA PRODUCE CO., Kan., 54 Pac. Rep. 11.

4. BAILMENTS—Rights of Bailor as to Third Persons.—Code Civ. Proc. § 2991, which provides that one who has allowed another to assume the apparent ownership of property for the purpose of making any transfer of it cannot set up his own title to defeat a *bona fide* pledgee, affords no protection to a pledgee of property received from one with whom it was left for safe-keeping.—SHAEFFER V. LACY, Cal., 54 Pac. Rep. 72.

5. BANKS AND BANKING—Suits by Depositors.—A depositor in a bank does not sustain to it a relation like that of a stockholder in a corporation, and therefore is not subject to the requirement of the ninety fourth equity rule, requiring stockholders, before they can maintain suits, to assert rights properly enforceable by the corporation itself, to show that they have sought in vain to procure action by the corporation.—FOSTER V. BANK OF ABINGDON, U. S. C. C., W. D. (Va.), 88 Fed. Rep. 604.

6. BILLS AND NOTES—Action Against Indorser.—The allegation of the affidavit of defense in action against indorser of note that the notice of protest was never sent to him, as alleged in the statement, but that all such notices were to another person, who showed one of them to him after keeping it 11 or 12 days, and that this was the only attempt made to notify him of the protest, is sufficient without the averment that "affiant is informed, believes and expects to be able to prove" the facts averred by him; this being necessary only where affiant cannot state the facts as to his own knowledge.—WOLF V. JACOBS, Penn., 41 Atl. Rep. 27.

7. BUILDING AND LOAN ASSOCIATION — Charter.—A building and loan association, as such organizations usually exist to-day, is a private corporation, designed for the purpose of accumulating into its treasury, by means of the gradual payment by its members of their stock subscriptions in periodical installments, a fund to be invested from time to time in advances made to such shareholders on their stock as may apply for this privilege, on approved security, the borrowing members paying interest and a premium for this preference in securing an advancement over other members, and continuing to pay the regular installments on their stock in addition; all of which funds, together with payments made by the non-borrowing members, including fines, forfeitures and other like revenues, go into the common fund until it, with the profits thereon, aggregates the face value of all the shares in the association, the legal effect of which is to extinguish the liability incurred for the loans and advancements, and to distribute to each non-borrowing member the par value of his stock.—COOK V. EQUITABLE BUILDING & LOAN ASSN., Ga., 30 S. E. Rep. 911.

8. BUILDING AND LOAN ASSOCIATIONS—Withdrawals.—A by-law of a building and loan association provided that "withdrawn stock will be paid for in the order in which notice is given, but the association shall not be required to use in the payment thereof in any one month, without the consent of the board of directors, more than one-half of the net receipts of the loan fund for that month." Held that, on the appointment of receivers for said association, the amount of the withdrawal value of stock of one who had previously given notice of withdrawal became a payable demand, on which suit might be brought, although the appointment of the receivers rendered performance of the contract impossible on the part of the association.—SOUTHERN BUILDING & LOAN ASSN. OF KNOXVILLE, TENN., V. PRICE, Md., 41 Atl. Rep. 53.

9. CARRIERS—Contract of Carriage.—When a common carrier issues to a person a ticket between two points along its line of road, receiving the full amount the carrier is lawfully authorized to charge for such ticket, and there is no express contract between them as to the time in which the ticket shall be used, the carrier is bound to carry the person between the points designated at any time before the right of the purchaser would be lost under the law by lapse of time.—BOYD V. SPENCER, Ga., 30 S. E. Rep. 841.

10. CARRIERS—Passenger—Contributory Negligence.—Where a train stops at a station for dinner, and a passenger goes from the coach to the eating house, and after luncheon returns to the coach in safety, and thereafter leaves the coach, and goes out upon the platform maintained by the company for the use of passengers, and is injured by reason of the defective platform, held, that this court cannot declare as a matter of law that the passenger was negligent, or

that the obligation of the company to provide safe passage had been fulfilled, or that the relationship of passenger to the company for the time ceased.—ST. LOUIS & S. F. RY. CO. v. COULSON, Kan., 54 Pac. Rep. 2.

11. CARRIERS OF GOODS—Damages.—The owner of a vessel entered into a charter party to carry goods in it to a certain place, agreeing to keep the vessel, during the voyage, tight, staunch and well fitted, that all the vessel should be at the sole use of plaintiff, and that he would receive on board during the voyage the goods specified for a stipulated consideration. Held, that there was an implied obligation that loading and unloading should be so done by the vessel owner as not to cause unnecessary injury to the goods, under Civ. Code, § 2114, requiring ordinary care and diligence of a carrier for reward.—KERRY v. PACIFIC MARINE CO., Cal., 54 Pac. Rep. 89.

12. CARRIERS OF GOODS—Duties of Connecting Lines Inter Se.—The rules of the common law do not require a carrier to receive goods for carriage, either from a consignor or a connecting carrier, without prepayment of its charges if demanded, nor to advance the charges of a connecting carrier from which it receives goods in the course of transportation; nor can it be required to extend such credit or make such advances to one connecting carrier because it does so to another.—SOUTHERN INDIANA EXP. CO. v. UNITED STATES EXP. CO., U. S. C. C., D. (Ind.), 88 Fed. Rep. 659.

13. CARRIERS OF GOODS—Lien for Charges.—The lien of a carrier for transportation charges on property received from a mortgagor in possession with the right to move from place to place is inferior to that of a mortgage of which the carrier has both constructive and actual knowledge.—OWEN v. BURLINGTON, C. R. & N. RY. CO., S. Dak., 76 N. W. Rep. 302.

14. CONFLICT OF LAWS—Limitation of Actions.—The Maryland statute of limitations is pleadable in an action in a federal court in that State, against a citizen thereof, to enforce a liability imposed by a Georgia statute on stockholders in a Georgia bank, when the statute giving the right of action does not itself provide a limitation, and especially when there is no statute of limitations whatever in Georgia applicable to the case.—BRUNSWICK TERMINAL CO. v. NATIONAL BANK OF BALTIMORE, U. S. C. C., D. (Md.), 88 Fed. Rep. 607.

15. CONSTITUTIONAL LAW—Commerce—Sales of Goods.—Laws 1897, ch. 102, imposing a license fee on solicitors taking orders for mercantile establishments, violates the interstate commerce clause of the constitution of the United States, as against a salesman for a house in another State selling clothing by sample, to be made up from measurements taken by the salesman; and this although there is no discrimination as to the amount of the fee between resident and non-resident establishments.—STATE v. RANKIN, S. Dak., 76 N. W. Rep. 299.

16. CONTRACT — Damages — Performance.—Damages are not recoverable against a corporation for its failure to perform a contract for the sale and delivery of merchandise, where performance was prevented solely by the action of a court in appointing a receiver for the corporation, and enjoining all others from interfering with its business or property. In such case the breach of contract is *damnum absque injuria*.—MALCOMSON v. WAPPOO MILLS, U. S. C. C., D. (S. Car.), 88 Fed. Rep. 680.

17. CONTRACT—Option Contract—Consideration.—An offer to sell property, or to transfer a chose in action, with an agreement to keep the offer open until a day named, or for a reasonable time, during which the person to whom it is made may accept, will be binding if a consideration for so doing is given; otherwise it will not.—WALKER v. BAMBERGER, Utah, 54 Pac. Rep. 108.

18. CONTRACT—Sales—Meeting of Minds.—A seller, in giving terms, stated that the "freight allowance" was 74 cents, believing he was answering an inquiry simply as to the freight rate. The buyer understood the term to mean an allowance of 74 cents per hundred pounds from the invoice price, such allowance being known as a discount among merchants. The goods were sold by the gross, and there was no evidence as to how the discount was to be computed. Held, that the buyer was not entitled to any deduction, there having been no contract, because of the failure of the minds of the parties to meet.—PEERLESS GLASS CO. v. PACIFIC CROCKERY & TINWARE CO., Cal., 54 Pac. Rep. 101.

19. CONTRACT OF CORPORATION.—Where the president and secretary of a corporation execute a contract in behalf of the company, which is regular on its face and not shown to be outside of the regular business of the corporation, it is *prima facie* evidence that it was executed with authority, and those who deny the authority take upon themselves the burden of establishing their claim.—NATIONAL BANK OF COMMERCE v. ATKINSON, Kan., 54 Pac. Rep. 8.

20. CORPORATIONS—Receivers — Collateral Attack.—That an association which filed articles of incorporation, and did business as a corporation, was a corporation, cannot be gainsaid by one against whom its receiver brought suit for property which it, while insolvent to his knowledge, sold him in payment of a debt, though it had no authorized stock subscription, and the statute prohibited its doing business before such subscription was made, and its officers had not taken the oath of office.—CARROLL v. PACIFIC NAT. BANK, Wash., 54 Pac. Rep. 32.

21. CRIMINAL EVIDENCE—Homicide — Dying Declarations.—A writing signed by a person since deceased, when in *articulo mortis*, and conscious of his condition, is, when accompanied by evidence showing that it was read over to him, that he understood its contents, and that he intended it as his dying declaration, admissible in evidence so far as it relates to "the cause of his death and the person who killed him," no matter when or by whom it is prepared; the circumstances attending its preparation, and any question as to whether or not the deceased understood its contents, being for consideration by the jury in determining what weight should be attached to such declaration.—PERRY v. STATE, Ga., 30 S. E. Rep. 903.

22. CRIMINAL LAW—Instructions—Reasonable Doubt.—It is not good cause for granting a new trial in a criminal case that the judge, after correctly charging concerning the law in relation to "reasonable doubt" of the defendants' guilt, added in connection therewith, "but if, on the other hand, you are satisfied of their guilt to a reasonable and moral certainty, then it would be your duty to find them guilty," it being apparent from the instructions as to reasonable doubt, taken all together, that the judge intended to convey to the jury the idea that the reasonable and moral certainty of guilt to which he referred was mental conviction excluding any reasonable doubt of guilt.—BONE v. STATE, Ga., 30 S. E. Rep. 845.

23. CRIMINAL LAW — Suspension of Sentence.—There is no law of force in this State which confers upon a judge any power or authority to suspend the execution of a sentence imposed in a criminal case, except as an incident to a review of the judgment; and therefore a sentence, to which no exception is taken, directing, among other things, that the accused do work in a chain gang for a term of six months, cannot lawfully be qualified by adding thereto the words: "Sentence of six months suspended until further order of the court." Such words in such a sentence are of no force, and consequently should be ignored, and the sentence executed just as if they did not appear therein.—NEAL v. STATE, Ga., 30 S. E. Rep. 858.

24. DECEIT—Fraud.—Where a person makes fraudulent misrepresentations to individuals to induce them to form a corporation, and to have the corporation, after its organization, enter into a contract with him, the fact that he never has any direct communication with the corporation previous to its entering into the contract will not relieve him from responsibility to it for damages resulting from his fraud.—SCHOFIELD

GEAR & PULLEY CO. v. SCHOFIELD, Conn., 40 Atl. Rep. 1046.

25. DEED — Delivery — Evidence.—There is no sufficient evidence on the question of delivery to go to the jury; the scrivener having testified that after W and her husband had executed the deed, the consideration of which was the support for life of W's husband by B, her brother, they left it with witness, saying that he was to keep it, without saying how long, and that W afterwards came and got it, and others having testified that W said she had deeded the farm to B, to have if he took care of her husband for life and she died before him, and it appearing that, W having married again after the death of her husband, B, who had been living on the property with her, moved away.—BENEDICK v. BENEDICK, Penn., 41 Atl. Rep. 40.

26. ELECTIONS — Political Convention—Nominations.—A political convention for the nomination of candidates, in the absence of statutory regulations to the contrary, has control over its own proceedings; and a majority of the delegates may, if there be no fraud or oppression, control its action, and correct or reverse any action previously taken by it. Unless such convention acts arbitrarily, oppressively, or fraudulently in the premises, its final determination as to candidates, or any other question within its jurisdiction, will be followed by the courts.—PHILLIPS v. GALLAGHER, Minn., 76 N. E. Rep. 285.

27. EMINENT DOMAIN—Compensation—Ejectment.—A railroad company in good faith purchased a right of way from one claiming to have acquired title thereto through another regularly chartered railroad company, which had taken the right of way and operated a railroad thereon, but had failed to acquire the title by condemnation or otherwise. Held, that ejectment would not lie to recover possession of land so taken, plaintiff having a right to compensation only.—SAUNDERS v. MEMPHIS, ETC. R. CO., Tenn., 47 S. W. Rep. 155.

28. EMINENT DOMAIN—Personal Property—Damages.—The measure of damages where coal mined, but left on the surface, is taken by a railroad, and occupied for a roadbed, is that for personal property,—the market value, less the cost of marketing it.—LEHIGH VALLEY COAL CO. v. WILKESBARRE & E. R. CO., Penn., 41 Atl. Rep. 37.

29. EQUITY PLEADING — Decree — Vacation.—The annulment of a decree obtained in an *ex parte* proceeding, not claimed to have been secured by fraud, but the effect of which is a fraud on the rights of interested parties without notice of the hearing, may be had on a petition in the original cause, rather than by original bill.—MALLERY v. QUINN, Md., 40 Atl. Rep. 1079.

30. ESTOPPEL TO ASSERT TITLE — Law.—Where defendant stood by and permitted representatives of complainant's grantor to survey land for the purpose of selling it to complainant, and permitted the sale, without asserting any claim or title, he is estopped to assert title.—TENNESSEE COAL, IRON & R. CO. v. MCDOWELL, Tenn., 47 S. W. Rep. 153.

31. ESTOPPEL TO ASSERT TITLE—Married Women.—A married woman, who conveyed her real estate, and afterwards filed a bill to enforce a vendor's lien, asserting that the property had been sold, and that the price was due and unpaid, and obtained a decree for sale, and received the money paid in satisfaction of the decree from a subsequent grantee, and who had knowledge of extensive improvements being made on the property by the purchaser, is estopped to assert title, notwithstanding her privy examination to the deed was never taken.—RAWLEY v. BURRIS, Tenn., 47 S. W. Rep. 176.

32. EVIDENCE — Deeds — Admissibility.—Under Rev. St. Mo. 1889, §§ 4858, 4864, 4865, certified copies of the record of a deed, acknowledged according to the law in force at the time of its execution, but since repealed, are admissible in evidence without proof of the execution of the original, when such deed has been recorded 30 years or more prior to the time of offering such copy in evidence.—RIGNEY v. PLASTER, U. S. C. C., W. D. (Mo.), 88 Fed. Rep. 686.

33. EVIDENCE—Opinion Evidence.—Opinion evidence was proper where the fact in issue was the danger of cleaning a carding machine in a wooden mill while the roller was in operation, and the description of the machine and its operation tended to establish the fact of danger by establishing other facts from which it might be inferred, but the inference was to be based on special knowledge and experience in the use of such machinery.—WHITAKER v. CAMPBELL, Penn., 41 Atl. Rep. 38.

34. EXECUTION—Levy—Sale.—Where a judgment was obtained against A and B as joint defendants, and, in consequence of a representation made by B that a certain tract of land belonged to A, the plaintiff had such land levied on and sold as the property of A, and where it further appeared that A had the legal title to the land, but B had a secret equitable interest therein which was not disclosed to the plaintiff, held, that the purchaser at such sale acquired a title to such land superior to B's equitable interest.—MORRIS v. ROGERS, Ga., 30 S. E. Rep. 937.

35. FEDERAL COURTS — Actions by Receivers of National Banks.—Circuit courts have jurisdiction of actions by receivers of national banks to collect assessments made by the comptroller, without regard to the amount involved.—BROWN v. SMITH, U. S. C. C., D. (Vt.), 88 Fed. Rep. 565.

36. FEDERAL COURTS—Diverse Citizenship — Actions by Assignees.—A non-resident assignee of a share in the estate of an intestate, who sues the administrators and their sureties to enforce obligations incurred by an alleged failure to properly discharge their duties, is not an assignee of a chose in action, in the meaning of the judiciary act of March 3, 1887, so as to be precluded from maintaining the suit in a federal court by the fact that his assignor could not have maintained it therein.—BERTHA ZINC & MINERAL CO. v. VAUGHAN, U. S. C. C., W. D. (Va.), 88 Fed. Rep. 566.

37. FEDERAL AND STATE COURTS — Dissolution of Corporation.—Proceedings brought by a public officer under a State statute for the winding up of a corporation, and the appointment of a receiver therein, do not deprive the circuit court of the United States of jurisdiction to proceed with a suit in equity brought by a stockholder, who is a resident of another State, against the corporation, for the adjustment of mutual claims, and to enjoin any disposition of his stock held by the corporation in pledge.—STRAINE v. BRADFORD SAVINGS BANK & TRUST CO., U. S. C. C., D. (Vt.), 88 Fed. Rep. 571.

38. FORCIBLE ENTRY AND DETAINER — When Lies.—Under Comp. Laws, § 6073, subd. 1, providing that an action for forcible entry and detainer is maintainable "where a party has by force, intimidation, fraud, or stealth entered upon the prior actual possession of real property of another, and detains" it, where plaintiff was not, at the time of the entry, in actual possession, and defendant obtained possession in good faith under a purchase from the actual occupant, who held the record title, the action cannot be maintained.—TORREY v. BERKE, S. Dak., 76 N. W. Rep. 303.

39. FRAUDS, STATUTE OF—Land Contracts — Performance.—Where purchasers of real estate, by oral contract, paid part of the price, and went into possession, the contract was taken out of the statute by part performance.—MERRILL v. WITHERBY, Ala., 23 South. Rep. 994.

40. FRAUDULENT CONVEYANCES—Delivery.—A debtor, after signing a bill of sale of furniture and books in his office to satisfy a debt, retained it for the purpose of acknowledgment; stating to the creditor that, if anything happened to him, it would be found in a certain drawer in his desk, in which he had been accustomed to leave letters and papers for the creditor. The debtor having thereafter absconded, the creditor entered the office, and in the drawer found the bill of sale, and a letter from the debtor, saying he had left it for him. Thereupon the creditor took possession of the office. Held a sufficient delivery, as against an-

other creditor subsequently attaching the property.—CHEZUM V. PARKER, Wash., 54 Pac. Rep. 22.

41. FRAUDULENT CONVEYANCES — Garnishment.—A lien on personal property capable of manual delivery, in possession of a transferee under a conveyance alleged to be fraudulent as to creditors, is not acquired by service of garnishment on the transferee, since Code Civ. Proc. (Comp. St. 1887) § 186, subd. 3, provides that personal property capable of manual delivery shall be attached by taking it into custody.—WILSON V. SAX, Mont., 54 Pac. Rep. 46.

42. FRAUDULENT CONVEYANCES—Reservation of Benefits.—Property conveyed without consideration was the next day reconveyed by a deed which provided that it should be held in trust for the grantee, who was to retain possession and receive the income thereof during his life, and after his death hold the same, unless disposed of as authorized in the instrument, for his daughters. The deed also gave the grantee full power to lease, sell, mortgage, or devise the property, and without obligation of the purchasers or mortgagees to see to the application of the purchase money. Held, that the fraudulent intent of the grantee appeared on the face of the instrument, and the deeds would be set aside at the suit of subsequent creditors.—SCOTT V. KEANE, Md., 40 Atl. Rep. 1070.

43. GAMING—Stock Gambling.—While a purchase of stock on margin, for speculation, is not gambling if it is the intention of the parties that a real purchase shall be made by the broker, though delivery be postponed or made to depend on future conditions, it is otherwise if it is the intention that there be no delivery, but that the account be settled on the basis of a rise or fall in prices.—WAGNER V. HILDERBRAND, Penn., 41 Atl. Rep. 34.

44. GARNISHMENT — Alimony.—Where a divorce is granted on account of the cruelties of the husband, alimony awarded the wife cannot be subjected to the payment of her debts existing prior to the decree of divorce.—KINGMAN V. CARTER, Kan., 54 Pac. Rep. 13.

45. GOVERNOR—Contracts — Ratification.—In the absence of a provision in the constitution or statutes expressly or by necessary implication authorizing the governor to employ experts to investigate the books and accounts of a State institution, he cannot bind the State by a contract for such employment.—YOUNG V. STATE, Wash., 54 Pac. Rep. 36.

46. HUSBAND AND WIFE—Liability Inter Se.—A husband who receives the rents of the wife's separate property under an agreement that he should receive them as her agent, and manage her estate for her, and, after paying necessary expenses out of the same, account to her for the balance, is liable to her therefor.—GRIFFITH V. GRIFFITH, Penn., 41 Pac. Rep. 30.

47. INJUNCTION.—A complaint to enjoin the State grain inspector from employing deputies and approving their bills for service, the State auditor from issuing warrants for the deputies' salaries on the grain inspection fund, and the treasurer from paying the warrants out of such fund, all of which acts said officers were directed by the grain inspection act to do, states no cause of action, because showing no infringement of plaintiff's rights, though alleging that he is a taxpayer, and paid grain inspection fees entering into such fund, and that the section of the act appropriating the fees for such expenses is unconstitutional (Const. art. 8, § 4), because not distinctly specifying the sum to be appropriated; the inspection fees being fixed, the fund being set apart for the purpose of paying the expenses of inspection, and such expenses being limited to the amount of fees collected.—BIRMINGHAM V. CHEETHAM, Wash., 54 Pac. Rep. 37.

48. INJUNCTION—Preliminary Injunction.—A preliminary injunction maintaining the *status quo* may properly issue whenever the questions of law or fact to be ultimately determined in a suit are grave and difficult, and injury to the moving party will be immediate, certain, and great if it is denied, while the loss or inconvenience to the opposing party will be comparatively small and insignificant if it is granted.—ALLISON V. CORSON, U. S. C. C. of App., Eighth Circuit, 88 Fed. Rep. 581.

49. INJUNCTION AGAINST EVICTION—Grounds.—Two persons rightfully in possession of land, one claiming a life estate therein, and the other, in recognition of this claim, jointly occupying the premises with the former, may, when upon equitable principles a petition will lie to enjoin their eviction, jointly bring and maintain the same.—JUSTICE V. AIKEN, Ga., 30 S. E. Rep. 941.

50. INSURANCE — Interest of Insured—Mortgages.—The purchaser of mortgaged property did not record her deed until after suit brought to foreclose the mortgage. Before expiration of time for redemption, an insurance policy was issued to her, which stated her interest in the premises as being her building, and provided that, unless her interest was not truly stated therein, it should be void, and that it was to be void if such interest was not unconditional and sole ownership. Held that, in view of Civ. Code, § 2888, which provides that a lien on property transfers no title, the policy correctly stated insured's interest, her failure to record the conveyance only affecting her title as against a purchaser at the foreclosure sale, if there should be no redemption.—BREEDLOVE V. NORWICH UNION FIRE INS. SOC., Cal., 54 Pac. Rep. 93.

51. INSURANCE — Removal of Debris.—Where a warehouse in which goods are stored is burned, and insurance companies which had issued policies upon the goods pay the owners thereof the full amount of the policies, and under an option in the contracts of insurance take possession of the damaged property, removing such parts as are salable, and disposing of them, and allowing the unsalable parts to remain upon the premises, and the warehouseman is required by the municipal authorities of the city in which the warehouse is located to remove the goods remaining upon the premises, no equitable lien arises in his favor against the fund realized from the sale of the goods removed by the insurance companies for the expense incurred by him in removing such as were valueless and unsalable.—SAVANNAH STEAM RICE-MILL CO. V. HULL, Ga., 30 S. E. Rep. 952.

52. JUDGMENTS — Causes of Action Barred.—A judgment in a suit to restrain the use, and for the cancellation, of certain deeds, on the ground that they had not been executed or delivered, is a bar to a suit between the same parties, litigating in the same right, to restrain the use of the same deeds, and to cancel them, on the ground that they had been canceled as between the parties before being recorded, since a cause of action cannot be split.—WILDMAN V. WILDMAN, Conn., 41 Atl. Rep. 1.

53. JUDGMENT—Vacation and Entry.—The vacation of judgment for plaintiff on defendant's motion for a new trial, and entry of another judgment for plaintiff for a less amount, without a hearing, is error, which cannot be treated as harmless on the ground that the last judgment was correct as shown by the pleadings, the issues made by the latter being hazy.—GRIFFITH V. MAXWELL, Wash., 54 Pac. Rep. 35.

54. JUDGMENTS — Vacation for Defects in Process.—Under Pub. St. ch. 187, § 3, providing that a judgment shall not be reversed or arrested for a defect or imperfection in matter of form which might have been amended, a default judgment against a resident will not be set aside because the summons, issued in 1896, bore date 29th October, 1890, and commanded defendant to appear on 14th November "next," where defendant was not misled by the mistake.—BISHOP V. DONNELL, Mass., 51 N. E. Rep. 170.

55. JUDICIAL SALES—Purchase by Judgment Creditor.—The purchaser of real estate at a judicial sale was the assignee of the judgment under which the sale was made, and bid the amount of the judgment, and added to his bid the amount of several judgments in his hands for collection, but paid no cash on his bid. Held, that a grantee of the judgment debtor who was not a party

to the proceedings would be permitted to redeem on payment of the amount of the judgment under which the property was sold.—CAMPBELL v. ATWOOD, Tenn., 47 S. W. Rep. 168.

56. LANDLORD AND TENANT — Cropping Contract—Rent.—A contract whereby one agrees to farm land let to him for a term of years, and to give annually for the use thereof a certain portion of the products grown thereon, is a lease, and not a cropping contract; and the portion of the product to be delivered to the landlord when gathered is rent.—CLARKE v. COBB, Cal., 54 Pac. Rep. 74.

57. LIFE INSURANCE POLICY—Right to Contest.—A stipulation in a policy of life insurance that "this policy is incontestable after three years from its date, provided three full yearly premiums have been made upon it, except that error in the age of the insured is open to adjustment," in a manner therein prescribed, is valid; and after payment of the premiums called for, and the lapse of time specified, the insurer is, with the exception indicated, precluded from setting up any defense based upon misrepresentations or warranties made by the insured in his application, whether fraudulent or otherwise.—MASSACHUSETTS BENEFIT LIFE ASSN. v. ROBINSON, Ga., 30 S. E. Rep. 918.

58. LIMITATIONS—Action Against Heirs.—The right of action against heirs to whom the ancestor's estate has been distributed under administration proceedings, to compel a refunding to one claiming damages for breach of a covenant of warranty occurring after such distribution, is not barred until five years after such breach.—WOOD v. CROSS, Kan., 54 Pac. Rep. 12.

59. LIMITATIONS — Action for Wrongful Death.—The right which the statute (Civ. Code, §§ 3828, 3829), gives to the widow to recover for the homicide of her husband when his death results from a crime or from criminal or other negligence, cannot exist until he is actually dead, and the statute of limitations begins to run from the date of his death, and not from the time at which the injury was inflicted which caused the death.—WESTERN & A. R. CO. v. BASS, Ga., 30 S. E. Rep. 874.

60. MARRIAGE—Validity.—Pub. St. ch. 145, § 4, providing that marriages contracted while either of the parties has a former husband or wife living shall be void, applies only to marriages contracted in Massachusetts.—WHIPPEN v. WHIPPEN, Mass., 51 N. E. Rep. 174.

61. MASTER AND SERVANT—Duty to Warn Youthful Employee.—The fact that a boy of 14 had not been warned of the danger attending the use of a circular saw, which he used occasionally in his employment, did not render the master liable for injuries received by the boy in using the saw, where he knew precisely the risks attendant on its use.—HETTCHEN v. CHIPMAN, Md., 41 Atl. Rep. 65.

62. MECHANICS' LIENS — Foreclosure — Pleading and Proof.—A complaint to foreclose a mechanic's lien, based on a claim for services performed in repairing defendant's property under an express agreement, is not sustained by proof of an agreement with defendant's husband and her consent thereto after performance had commenced.—WHITING v. KOEPKE, Conn., 40 Atl. Rep. 1053.

63. MECHANIC'S LIEN — Parol Contract. — Where a building contract in writing, containing no reference to lien, is made, a supplemental oral contract providing against lien will defeat right to lien of subcontractor only on proof of notice thereof to him.—EAST STROUDSBURG LUMBER CO. v. GILL, Penn., 41 Atl. Rep. 41.

64. MORTGAGE — Junior Mortgagee — Rights. — The equitable rule under which the holder of a junior mortgage is entitled to tender to the holder of a senior mortgage the amount due thereon, and demand an assignment of the same, is not applicable unless the former shows that such an assignment is necessary to his protection; nor can this rule be invoked by a mortgagee against a judgment creditor of his mortgagor having equities at least equal to those of the mortgagee, for the purpose of compelling the judgment creditor to assign to the mortgagee an older mortgage executed by their common debtor, and to which the judgment creditor had acquired title for the express purpose of protecting his junior judgment lien.—TILLMAN v. STEWART, Ga., 30 S. E. Rep. 949.

65. MORTGAGES—Priority.—Mortgage to S has priority over that to P, though of later date and recorded later, negotiation for loan by P having been abandoned after the mortgage was recorded, and not renewed till after mortgage to S had been recorded, and money advanced thereunder.—IN RE AMBROSE, Penn., 41 Atl. Rep. 28.

66. MORTGAGES—Priority over Street Assessments.—Code Civ. Proc. § 726, providing that no person having an unrecorded lien on mortgaged property need be made a party to proceedings to foreclose the mortgage, and that the judgment rendered therein is conclusive against him, refers only to those holding from the mortgagor, and not to a purchaser at a sale under a street assessment.—WILSON v. CALIFORNIA BANK, Cal., 54 Pac. Rep. 119.

67. MORTGAGES—Record.—Where one borrows money with which to redeem from a foreclosure sale, and, as security therefor, assigns to the lender all his right, as redemptioner or otherwise, by reason of the redemption, and authorizes him to obtain from the sheriff a deed of the property in his own name, the borrower does not convey the land absolutely, but only hypothecates his interest in it, inclusive of the right, under Code Civ. Proc. § 707, to receive the rents from the terretenant, and the lender holds the sheriff's deed as mortgagee.—SAN JOSE SAFE DEPOSIT BANK OF SAVINGS v. BANK OF MADERA, Cal., 54 Pac. Rep. 83.

68. MUNICIPAL CORPORATIONS—Bonds— Invalidity. — The holder of a bond issued for the erection of a school house, which is void because issued in excess of the amount allowed by statute, may recover as on a *quantum meruit* the value of the school house erected, where it has been retained for continuous use by the school district.—LIVINGSTON v. SCHOOL DIST. NO. 7 OF BROOKINGS COUNTY, S. DAK., 76 N. W. Rep. 301.

69. MUNICIPAL CORPORATIONS — Expenditures — Revenues.—Where interest and principal of municipal bonds are specially charged on the general revenues of the city, only the surplus income, after legitimate expenses have been provided for, can be applied to such debt.—WHITE v. MAYOR, ETC. OF CITY OF DECATUR, Ala., 23 South. Rep. 999.

70. NEGLIGENCE — Evidence. — There is nothing on which to base a finding of negligence of the owner of a mimic railroad, the cars on which were run down an elliptical incline by gravity, where one of the occupants of a car was in some way injured while going through a tunnel incasing part of the track; it being a matter of conjecture how it happened; no defect in, or abnormal condition affecting, the means of transportation being shown; and it appearing merely that, while he was in the car when it entered the tunnel, he was not when it emerged, but was found inside, unconscious, with a wound on the head.—BENEDICK v. POTTS, Md., 40 Atl. Rep. 1067.

71. PLEDGE—Sale of Collaterals.—Where the officers of a bank are empowered to sell collateral security upon the failure of the maker of the note to comply with its terms, and the option is given by which they can dispose of stocks, held as security, at public or private sale, and they choose to make the sale public, they must conform to the rules governing public sales, so far as publicity is concerned. The power of sale must be exercised with a view to the interests of the pledgor as well as the pledgee, and the sale should not be forced for barely sufficient money to secure the payment of the debt, when the securities are known to be of more than double the value of the debt.—FOOTE v. UTAH COMMERCIAL & SAVINGS BANK, Utah, 54 Pac. Rep. 104.

72. PRINCIPAL AND AGENT—Agency Coupled with Interest.—To constitute an agency coupled with an interest, both agency and interest must be derived from the same source.—BLACK v. HARSHA, Kan., 54 Pac. Rep. 21.

73. PRINCIPAL AND AGENT—Authority to Accept Payment of Mortgage.—A foreign mortgage company had made in 10 years loans aggregating more than $200,000, through an agent having full authority to accept or reject loans, draw and record papers pay over money to mortgagors, and collect the interest and principal as they matured. No payments were made to any one else, and the satisfactions were sent to the agent for delivery to the mortgagor on payment or renewal. Only one mortgage was given in each instance, and the agent's commissions were paid out of interest collected on coupons. The name of the agent was printed in bold type on the face of all notes taken, and when paid the notes were canceled by him. Held, that a payment in full to such agent by a mortgagor to whom notice of termination of the agency had not been communicated operated as a satisfaction of the mortgage. — EDINBURGH-AMERICAN LAND MORTG. CO. v. NOONAN, S. Dak., 76 N. W. Rep. 298.

74. PRINCIPAL AND AGENT — Implied Agency. — An agent employed to operate a shingle mill, with authority to contract for and estimate shingle bolts, subject to the approval of the principal, has no implied authority to bind the principal for the construction of a logging road to timber purchased by the principal. —GREGORY v. LOOSE, Wash., 54 Pac. Rep. 38.

75. PRINCIPAL AND AGENT—Undisclosed Agency.—A contract to furnish materials and render services being made by authorized agent for benefit of principal, the latter may, on performance thereof, sue for consideration in his own name, subject to any defenses available against the agent, though the fact of an agency was not disclosed. — SULLIVAN v. SHAILOR, Conn., 40 Atl. Rep. 1054.

76. PRINCIPAL AND SURETY — Official Bonds. — Code Pub. Gen. Laws, art. 77, prescribes the powers of boards of county school commissioners; and section 67 requires bonds of school board treasurers to be conditioned to pay over all moneys coming into their hands as the school board may, under said article, direct. The bond of a school treasurer provided that he would pay over all moneys coming into his hands as the board should direct, reference to the statute being designedly omitted at the request of the surety. Held, that no recovery could be had on the bond for moneys paid out on unauthorized and illegal orders of the school commissioners.— STATE v. HILL, Md., 41 Atl. Rep. 61.

77. PRINCIPAL AND SURETY—When Relation Exists.—A contract, whatever be its form, by which one obligates himself to pay the debt of another in consideration of credit or indulgence or other benefit given to his principal, the principal remaining bound for the debt, is a contract of suretyship. Under the provisions of our Code, "if the fact of suretyship does not appear on the face of the contract, it may be proved by parol.—BUCK v. BANK OF STATE OF GEORGIA, Ga., 30 S. E. Rep. 872.

78. RAILROAD COMPANY — Commission — Powers. — There is no law which confers upon the railroad commission of this State the power to compel a railroad company to make a contract for the shipment of goods beyond the terminus of its own line, or to issue a through bill of lading binding such company so to do; nor is the fact that a railroad company actually contracts for the shipment and delivery of goods beyond its own terminus to a designated point, and issues bills of lading accordingly, when the same are routed over a particular one of its connecting lines, to be treated as unjustly discriminating against another connecting line, because the company first mentioned refuses to issue through bills of lading for the shipment over the latter of goods consigned to the same point of destination.—STATE v. WRIGHTSVILLE & T. R. CO., Ga., 30 S. E. Rep. 891.

79. RAILROAD COMPANY—Eminent Domain.—The appropriation by a railroad of a right of way through plaintiff's six-acre tract is not a severance of it, so as to prevent its being considered one property in assessing damages for the appropriation for another railroad right of way and its construction on one side of the other road; the tract having been purchased by plaintiff for the manufacture of paper, the whole tract being as necessary to his purpose as any part of it, it being impossible to operate the mill on one side without the supply of water furnished from the stream and reservoir on the other, and plaintiff having a right of way across the railroad.—RUDOLPH v. PENNSYLVANIA S. V. R. CO., Penn., 40 Atl. Rep. 1083.

80. RAILROAD COMPANY—Fire Set by Locomotive.—Under the facts of this case as stated in the opinion, it is held that, notwithstanding the petition contained specific allegations as to the negligence of the defendants respecting a railroad engine and its operation, whereby a fire, resulting in damage to the plaintiff, was caused, it was not necessary to prove such allegations, and that an instruction that such proof was not required was not erroneous. And further held, that the burden was upon the defendants to disprove their negligence in respect to the engine and its operation.—WALKER v. KENDALL, Kan., 54 Pac. Rep. 118.

81. RAILROAD COMPANY — Receivership — Preferred Claims.—Claims for supplies used in operating a railroad during a receivership, and for six months prior thereto, are entitled to preferred payment from the funds in the hands of the receivers, as against a mortgage on which the first default of interest occurred during the receivership, where the stock of supplies coming into the hands of the receivers exceeded the amount of such claims, and it appears that the net earnings under the receivership to the time of default on the mortgage interest, together with the betterments made, also largely exceeds such claims.—GRAND TRUNK RY. CO. v. CENTRAL VERMONT R. CO., U. S. C. C., D. (Vt.), 88 Fed. Rep. 620.

82. RECEIVERS — Power to Appoint.—The court has no power to appoint a receiver of lands *pendente lite* in an action by one not entitled to their possession, and involving only legal rights.—SAN JOSE SAFE-DEPOSIT BANK OF SAVINGS v. BANK OF MADERA, Cal., 54 Pac. Rep. 85.

83. REMOVAL OF CAUSES — Prosecutions before a justice of the peace for a non-indictable misdemeanor is removable to a federal court, under Rev. St. § 643, when the act charged was done by defendant under authority of a federal revenue officer, acting under color of his office.—COMMONWEALTH OF VIRGINIA v. BINGHAM, U. S. C. C., W. D. (Va.), 88 Fed. Rep. 561.

84. REMOVAL OF CAUSES—Separable Controversies.—Under the act of March 3, 1875, § 2, if in a suit there is a separable controversy, the parties to which, actually interested in the decision of it, are, on each side, wholly citizens of different States, then the suit may, on petition of one or more of the said parties to the separable controversy, be removed to a federal court. —SNOW v. SMITH, U. S. C. C., E. D. (Va.), 88 Fed. Rep. 657.

85. RES JUDICATA.—That a judgment may be *res judicata*, there must be identity of parties as well as subject-matter in the two litigations.—IN RE LIGHTNER'S ESTATE, Penn., 41 Atl. Rep. 46.

86. RIPARIAN RIGHTS—Tide Water.—An owner of land bounded by tide water has not only a right to the use and enjoyment of the contiguous water, but also to extend his lands into the water by means of wharves, and the right of accretion to whatever lands which, by natural or artificial means, are reclaimed from the sea, subject to whatever rights or franchises others may have, such as those of navigation or fishery, or such as belong to adjoining owners.—OCKERHAUSEN v. TYSON, Conn., 40 Atl. Rep. 1041.

87. SALE—Bailment.—Plaintiff delivered grain to defendant under an agreement by which plaintiff was to purchase and deliver it to defendant for sale, defendant agreeing to pay plaintiff the cost price and a certain sum additional per bushel during the month following its sale by him. Defendant had the right to sell to whom he saw fit, and was to be responsible for all sales, and collect the bills for the same. Held, that the delivery constituted a bailment, and not a sale, and defendant was not liable for grain received until he again sold it.—JOHNSON v. ALLEN, Conn., 40 Atl. Rep. 1056.

88. SALES OF COTTON — Title.—The act of 1854 (Acts 1853-54, p. 56; Civ. Code, § 3546), providing that cotton sold by planters and commission merchants on cash sale shall not be considered as the property of the buyer until fully paid for, although it may have been delivered to the buyer, applies to sales by commission merchants on their own account as well as sales by them as representatives of the planter.—NATIONAL BANK OF AUGUSTA v. AUGUSTA COTTON & COMPRESS CO., Ga., 30 S. E. Rep. 888.

89. SCHOOLS—Action on School Warrant.—Where the officers of a school district purchase school furniture and goods, and issue a warrant in payment therefor, the owner of the warrant is not required to allege that the furniture and goods were such as the board was authorized to purchase. If the board was not authorized to purchase the articles, this would be a good defense against the warrant, but the burden of alleging and proving the fact is upon the defendant.—BUFFALO SCHOOL FURNITURE CO. v. SCHOOL DISTS. NOS. 4, 30, AND 40 OF GRAY COUNTY, Kan., 54 Pac. Rep. 115.

90. STATUTE—Construction—Meaning of "Railroad."—The word "railroad" has no such fixed definition as to enable a court to determine whether, by its mere use in a statute, it applies to street railways or not. It may be used in its broad sense, which includes a street railroad, and any other kind of road on which rails of iron are laid for the wheels of cars to run upon, whether propelled by steam, electricity, horse, or other power, or it may be used in its technical sense, which does not apply to street railroads.—MASSACHUSETTS LOAN & TRUST CO. v. HAMILTON, U. S. C. C. of App., Ninth Circuit, 88 Fed. Rep. 588.

91. TENANTS IN COMMON — Subrogation to Rights of Co-tenant for Improvements.—One who furnished money to a co-tenant, to be used in placing improvements on the land, with full knowledge of the co-tenants, is entitled to be subrogated to the right of the borrowing tenant, as against the others, to enforce an equitable lien for the improvements erected as contemplated.—WILLIAMS v. HARLAN, Md., 41 Atl. Rep. 51.

92. TRADE-MARKS — Geographical Names.—The false use of a geographical name will not be allowed by the federal courts, when it is so used to promote unfair competition and to induce the sale of spurious goods.—COLLINSPLATT v. FINLAYSON, U. S. C. C., S. D. (N. Y.), 88 Fed. Rep. 693.

93. TRIAL—Production of Books and Papers.—Where notice to produce papers, as to certain of the papers called for, is sufficiently definite and as to others too vague and uncertain in description and too extensive in range, and where, upon failure to comply with the notice, the judge directs the party notified to produce the papers called for in the notice, without specifying what part of the notice the order refers to, such order and a judgment by default entered for a failure to comply with the order are illegal.—GEORGIA IRON & COAL CO. v. ETOWAH IRON CO., Ga., 30 S. E. Rep. 878.

94. TRUST — Resulting Trust. — The contention of a debtor's wife, as against his creditor, that she has a resulting trust in land, cannot be maintained on the mere testimony of herself and husband, the documentary evidence showing that it was bought by his mother, and that she devised it to him.—KEGERREIS v. LUTZ, Penn., 41 Atl. Rep. 26.

95. TRUST—Voluntary Trusts—Revocation.—A deed of the greater part of the grantor's property to his brother, in trust to collect the income and pay it to him for life, and after his death to convey the property to certain relatives—the trustee, with the consent of the grantor, to convey during his life any part of the property, and invest the proceeds for the purposes of the trust—being prompted by the intemperate and improvident habits of the grantor, and containing no power of revocation, is irrevocable, and not testamentary.—WILSON v. ANDERSON, Penn., 40 Atl. Rep. 1097.

96. TRUST AND TRUSTEE—Authority of Trustees—Institution of Suits.—Where property is vested in three trustees, with power to bring suits, etc., one of them has no authority to institute a suit without the knowledge and consent of his co-trustees.—MCGEORGE v. BIGSTONE GAP IMP. CO., U. S. C. C., W. D. (Va.), 88 Fed. Rep. 599.

97. VENDOR AND PURCHASER— Contract.—Where the petition in an action for an alleged breach of a contract for the sale of land by the acre contained no description thereof other than that embraced in a written receipt and set forth no facts whatever by which the land could be located or identified, or its quantity ascertained, a motion to dismiss the petition, based on proper grounds, was rightly sustained, if the receipt in question was in its terms so vague and indefinite as to render it impossible to determine therefrom what land was therein intended to be described or the quantity thereof.—GATINS v. ANGIER, Ga., 30 S. E. Rep. 876.

98. WATER RIGHTS — Contracts. — Performance of a contract to convey "a good and sufficient water right" for the irrigation of a certain parcel of land was sufficiently tendered by an offer of water certificates issued by an irrigation corporation, guarantying the holder a flow of water of the quantity specified in the contract, together with a right of way through a pipe line reaching the lands to be irrigated for the conveyance of water "represented by said water certificates."—FAIRBANKS v. ROLLINS, Cal., 54 Pac. Rep. 79.

99. WATERS—Irrigation— Tenancy in Common.—One who buys land of, and at the same time succeeds to the interest of, a tenant in common in an irrigation ditch, cannot recover of his co-tenant for damages to the land from negligent construction or location of the ditch, his predecessor having performed part of the work of construction af the ditch; but he can recover of them any damages from their negligent maintenance thereof, his predecessor having, by agreement between him and them, been relieved from all responsibility for repairs, and they having thereby impliedly obliged themselves to keep up necessary repairs.—CROWDER v. MCDONNELL, Mont., 54 Pac. Rep. 43.

100. WILLS - Death of Devisee—Beneficiaries.—Testatrix devised realty to her daughter "during her life, and after her death to her children in fee simple, to be equally divided between them; but, if she die without such children or their issue surviving her, then I give and devise this one-half part to my son," etc. Held, that the vesting of the life estate was not made a condition precedent to the vesting of the remainder.—HOLLISTER v. BUTTERWORTH, Conn., 40 Atl. Rep. 1044.

101. WILLS—Designation of Beneficiary—Charities.—Where a bequest was to the inhabitants of a town in trust for specified purposes, and was referred to in the codicil as a donation to the town, and as a donation to the inhabitants of the town, the title to the fund is in the town.—HIGGINSON v. TURNER, Mass., 51 N. E. Rep. 172.

102. WITNESS—Wife as Witness.—Defendant in ejectment brought by purchaser at sheriff's sale under judgment against defendant's husband, then deceased, is competent to testify in support of her title; she claiming it, not from her husband, but by purchase in her own name, and the issue being whether she had paid for the property with her separate estate.—POUNDSTONE v. JONES, Penn., 41 Atl. Rep. 21.